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To be argued by
MILTON POLLACK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 9

HOWARD LAWN,

Petitioner,

—vs.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

OPINIONS BELOW.

The opinions of the Court of Appeals are reported at 232 F. 2d 589 (R. 2963) and 208 F. 2d 467. The opinions of the Southern District of New York (R. 2866; R. 179) are reported at 115 F. Supp. 674 and 16 F. R. D. 268.

GROUNDS OF JURISDICTION.

The judgment of the Court of Appeals for the Second Circuit (R. 2972) affirming a judgment of the District Court for the Southern District of New York (R. 2761) comes before this Court on a writ of certiorari granted October 15, 1956 (R. 3002), reported at 352 U. S. 865. The judgment of the Court of Appeals was entered on April 20, 1956. A timely petition for rehearing (filed April 25, 1956) was denied on May 8, 1956. Lawn's petition for a writ of certiorari was filed on June 4, 1956. The jurisdiction of this Court was invoked under 28 U. S. C. § 1254 (1).

STATUTES INVOLVED.

Internal Revenue Code of 1939:

"SEC. 145. PENALTIES.

* * * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

(53 Stat. 62)

18 U. S. C.

* * * * * *

"SEC. 371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

(62 Stat. 701)

QUESTIONS PRESENTED.

1. Whether the use of illegally obtained evidence in violation of two court orders for its suppression and return made before trial was fundamental error infringing the petitioner's privilege against self-incrimination and depriving him of liberty without due process of law?

2. Whether the petitioner was deprived of due process of law by the action of the prosecutor in:

(a) going outside the record in summation and "vouching" for the government's witnesses who were admitted criminals and perjurers and assuring the jury that the United States Attorney's office personally believed in the truth of what they said;

(b) charging the petitioner in the course of the summation with the commission of acts of violence and crimes, though no basis in fact existed for such accusations, and similarly misbehaving on the trial;

(c) certifying repeatedly to the court that no illegal evidence had been or would be used when in fact it had been used.

3. Whether the improper conduct of the prosecutor mentioned in question 2 can be condoned by this Court in the exercise of its duty to supervise the administration of criminal justice in the federal courts?

4. Whether it was a deprivation of the defendant's constitutional rights to refuse a requested hearing during the course of the trial to determine if the prosecution was making improper use of illegally secured evidence, it being established by the record that some such evidence was improperly offered at the trial by the prosecutor and admitted by the court?

5. Whether there was sufficient evidence to convict the petitioner as an aider and abettor or co-conspirator in the absence of any proof, direct or circumstantial, of any guilty knowledge, criminal intent, or purposive entry into tax evasion allegedly committed by others?

6. Whether a conviction for conspiracy or for aiding and abetting may be grounded on the mere presence of the petitioner and on acts beyond the period of limitation and subsequent to the conclusion of the alleged crimes?

7. Whether petitioner could be convicted of aiding and abetting the commission of a crime which the alleged principal was found not to have committed and which crime could not have been committed by any one else?

8. Whether Section 145(b) of the Internal Revenue Code of 1939 makes it a felony for a taxpayer, who has properly disclosed his sources of income and properly reported his tax liability, to fail to pay his reported tax liability, regardless of whether or not he attempts to conceal his capital assets or divert his capital to uses other than the payment of taxes?

STATEMENT OF THE CASE.

Preliminary.

On July 23, 1953, the petitioner was accused under the Internal Revenue Code of 1939, Sec. 145(b), of aiding and abetting William Giglio, a taxpayer, to conceal certain of his capital assets and to fail to use the same to pay his properly reported 1946 tax obligations (Count 7), and of aiding and abetting American Brands Corporation (hereafter ABC), a taxpayer, to divert certain of its capital assets to uses other than payment of its properly reported 1946 taxes (Count 9), and petitioner was also accused under the general conspiracy statute, 18 U. S. C. § 371, of conspiracy with the taxpayers charged with evading payment of their 1946 taxes (Count 10).

The taxpayer, ABC, was not charged in Count 9 or in any substantive count of the indictment but was charged only in the conspiracy count. The jury failed to return any verdict as to ABC and the Judge dismissed the conspiracy indictment against ABC (Count 10) (R. 2747).

The jury found against petitioner on Counts 7, 9 and 10, and his motions to dismiss, for an acquittal, and in arrest of judgment were denied (R. 2075, 2097, 2504-5, 2737).

Lawn not here as a delinquent taxpayer.

The petitioner Lawn is not one of the taxpayers accused in the ten count indictment.

No tax return or tax payable by Lawn is in any wise the subject of this action. He did not owe any responsibility or fiduciary duty whatever to pay the taxes of his co-defendants, the taxpayers, or to cause them to do so.

No delinquency in the tax returns of the taxpayers.

The tax returns for 1946 of Giglio and ABC are not questioned as false in either of the substantive counts against Lawn. Charges in the general conspiracy count concerning

improper tax returns by the taxpayers are not asserted against or related to Lawn. The government has heretofore conceded as to the counts against Lawn that it does not challenge the accuracy of the amounts of income, of the tax liability reported, or of the taxpayers' reports (R. 2895-6, 2715, 2717).

Lawn had no personal interest at stake.

Lawn had none of the taxpayers' assets in his possession or under his control. He had no stake in and could derive no personal advantage from thwarting the collection of the taxes due for 1946 from the others, the taxpayers at bar.

The "concealment" charges against the taxpayers in the indictment proceed on a notion that failure to pay one's debts for taxes (as distinct from an attempt to thwart the imposition of taxes by concealing facts as to one's income or deductions) may nonetheless be made the subject of criminal indictment under the tax laws. The counts against Lawn rest solely on the theory that wilful failure to pay a tax, truthfully reported, constitutes a felony (R. 2715, 2717). Income taxes due for the year 1946 from William Giglio and from ABC, although reported by them in their tax returns, were paid only in minor part.

There was no evidence that Lawn had knowledge of the 1946 income of the taxpayers or of the tax due thereon, or whether it was paid or how or the extent to which the taxpayers dealt with their capital assets, or what assets they had left with which to pay tax and other creditors. Lawn did not draw any checks for any of the taxpayers or act for any of them as a paying agent.

The background of this case.

In 1945, the taxpayers Giglio and Livorsi, and their wives, formed a limited partnership called Tavern Fruit Juice Company (hereafter "Tavern") (R. 986, 998, 1017-8).

In 1945, one Lubben and his associates, on the one side, and Giglio, Livorsi and their wives, on the other side, formed a limited partnership, called Eatsum Food Products Company Ltd. (hereafter "Eatsum"). Each side had a one-half interest therein (R. 302-3).

Eatsum purchased the assets and liabilities of a sole proprietorship previously owned by Lubben (R. 305-8).

Lubben had previously been engaged in the sugar black market, and after joining forces in Eatsum he brought his black market operations to the new partnership (R. 304-5).

The two partnerships (Tavern and Eatsum) earned substantial sums, and the income thereof was taxable to the partners as their individual income.

The corporate excess profits tax was repealed effective January 1, 1946 (R. 1069), and the maximum corporate tax rate thereafter was 38% compared to the maximum individual tax rate of 86%. Revenue Act of 1945, 26 U. S. C. 11, 15.

In 1946, Giglio and Livorsi formed a group of corporations which they surnamed "American" and put their partnership assets including profits into these corporations in exchange for stock and receivables. The corporations were formed in anticipation that a process for making synthetic sugar from waste products (R. 1070), to be sold at a low price, could be perfected (R. 1124-5).

Before fruition of the research and development of this substitute for sugar, and in 1947, natural sugar was again available and enormous moneys expended on the venture (R. 1077) were lost, the corporations were thrown into involuntary state court receivership by a *bona fide* creditor named Dupont (R. 2167), and Giglio and Livorsi lost their entire investments in the corporations—some $400,000—including the profits they had transferred thereto from the partnerships (R. 1489, 1528, 1529, 1530).

The partner-taxpayers were obliged to file income tax returns and pay taxes on their profits for the tax year 1946.

They (not Lawn) desired to extend their time to pay their taxes so that money would be available to complete the tremendous scientific discoveries which were virtually at hand. They believed that within a year money would be freely available to pay all taxes due (R. 1005, 1041, 1079). They obtained extensions on the reasoning to which Reth, Giglio's accountant and an alleged conspirator, testified on direct examination as a government witness, as follows:

> "Mr. Giglio pointed out to me that if we were to pay the taxes due to the Government at that particular time, there would be no money left to continue the extensive research, and based on conferences that we have had with Mr. Ronayne, the only thing that we would be subject to, or the partnership would be subject to, would be penalty and interest, and that could always be settled when the returns are filed. Mr. Giglio also felt that money to him is worth 6 per cent during the time that he owes, that he contemplated paying the Government a year later." (R. 1005; see also 1041, 1079)

The taxpayers did not have the money when they filed their tax returns, on September 15, 1947, and did not pay their 1946 taxes (R. 2340-4). As stated above, the "American" corporations were placed in receivership in December, 1947, and their assets were insufficient to satisfy their 1946 tax liabilities (R. 2155, 2167). Giglio filed a petition in bankruptcy in 1950 (R. 2269) and was discharged (R. 2272).

Lawn in the record.

The government placed Lawn in this case by charging that he aided the taxpayer Giglio in 1947 to sell his home in New Jersey—it was sold publicly—and by accusing Giglio (not Lawn) of pocketing the proceeds instead of paying his income taxes therewith (Count 7); that Lawn converted to his own use assets of the taxpayer American Brands Corporation (salaries paid to Lawn as an employee), which it should have used to pay its 1946 income taxes (Count 9); and by charging in the general conspiracy count that Lawn conspired in these tax evasions by the taxpayers (Count 10).

Lawn was a salaried employee for import-export trade and legitimate management of and research for American Agar on the sugar project. His salary, varying from $250 to $350 per week for services admittedly rendered, was moderate in view of the scope of his duties (R. 1023, 1915-24).

Roth, the government witness, described Lawn's duties:

> "to develop the jelly product for consumer packaging purposes on a national scale, and * * * research in finding a substitute for sugar." (R. 1023)
>
> "* * * Mr. Lawn discussed research with me also, because he was vitally interested in its ultimate outcome." (R. 1070)
>
> "The purpose of the research was to find a substitute for sugar from waste product of sugar refining companies, such as black strap molasses, and certain fruits, etc. Now the research was supposed to extract from this waste material the sugar content, and if the research was successful this sugar would have a cost of possibly two or three cents a pound after the process was developed than 6 or 7 cents a pound that sugar in bags would normally cost. That is what this research is or was." (R. 1070)

Lawn also was an officer and director of some of the corporations involved (R. 1915-24), although these titles were merely nominal (R. 1142).

Lawn had provided the staff of needed chemists (R. 1140-1). Lawn's sole financial interest was as a minor stockholder in the research company, American Agar (R. 1142), and as a stockholder of a company known as Lawn International (R. 1134). The Agar operation was not successful (R. 1141). Lawn International was not named in the indictment, had no connection with the matters involved herein, and was unwarrantably injected into the case by the prosecutor over objections (R. 1204-5).

Lawn had no financial interest in any other Giglio enterprise (R. 1134, 1140-1).

The government witness, Roth, underscored the absence of any stake on the part of Lawn in the ventures of the taxpayers here involved:

> "Yes, because Mr. Lawn had absolutely nothing to do in the production of profit in manufacturing jelly of the original Tavern, American Brands Corporation, American Wholesale; therefore he is not entitled to any stock, only as an employee." (R. 1142)

The other key government witness, Lubben, eliminated Lawn as to the remainder of the taxpayers' ventures:

> "Q. Did Mr. Lawn have any official capacity with Eatsum Food Products Co. Ltd.? A. Sir, he wasn't any partner, sir, if that is what you mean." (R. 329; see also R. 303)

The Trial Judge, immediately after the trial and nine months before Lawn was sentenced, noted the employee status of the defendant Lawn as follows:

> "I do not think you are part of the enterprise, in the same class with Mr. Giglio and Mr. Livorsi. I do not say this disparagingly of you at all, but you were a man who was—I use the word 'hired' in a good sense, and not in any invidious sense, by them, very much the same way Mr. Roth was." (R. 2928)

Lawn was charged in this case with complicity because of the activities ascribed to him to head off prosecution of the others after their tax returns had been filed and their alleged tax evasion was complete. These alleged activities are not mentioned in the indictment.

No prima facie proof of the wrongdoing charged to Lawn was adduced by the government witnesses. Instead, the prosecutor claimed that "the heart of this case is fixing, it is bribery" (R. 2587). The bridge between the inadequate proofs and the charges against Lawn was the product of fertile imagination, and the prosecutor must have been as surprised as was Lawn by the unexpected verdict against him.

On the facts applicable to Lawn, alone, had they been tried separately—obviously there could not have been a conviction. Lawn's motion for a separate trial was denied (R. 250, 253).

The prosecutor and the Court below sought to spell out the existence of a case against Lawn [1] by drawing inferences of guilt from Lawn's associations with the taxpayers; [2] by inferring knowledge on the part of Lawn of the taxpayers' wrongs from legal abilities ascribed to him; [3] by pointing to Lawn's acceptance of salary for his business services; [4] by acts after termination of the alleged crimes (e.g., R. 1218-9, 1237-9, 1975) and [5] by acts of others beyond the six-year limitary period (e.g., R. 1124-5).

The adversaries on Lawn's case.

A short biography of the persons whose testimony was used to implicate the defendants will place their evidence in proper perspective.

a. Government witnesses:

The government's case depended on the word of the following two witnesses.

David George Lubben, the government's witness, was well characterized by the prosecutor himself as a person who

> "was a perjurer and a black marketeer and practically anything else you want to talk about * * *. He certainly admitted many other crimes * * *." (R. 2589)

Lubben was never prosecuted by the government for any of his crimes although his crimes were known and admitted.

Louis J. Roth, the other principal witness, was tabbed by the prosecutor as follows:

> "On Mr. Roth I think I brought out 15 or 20 different crimes. He is under indictment now for a lot. He had pleaded guilty to ten, I believe, but has admitted about ten more here. He can go to jail for 200 years." (R. 2588)

Roth was given a suspended sentence at the recommendation of the United States Attorney (R. 8).

b. Howard M. Lawn.

Roth exculpated Lawn, and assigned others to all phases of the crimes charged (R. 1005-6, 1076, 1115, 999, 1031, 1115, 1119, 1125, 1024, 1134, 1135, 1182, 1479).

Lawn is a lawyer. Graduate of Harvard Law School. Graduate of Harvard College. Former Chief of the Criminal Division of the United States Attorney's office in the District of New Jersey (R. 947, 2889).

A government witness summed up Lawn:

> "He was regarded as a very good character and an excellent lawyer in his capacity as an associate with Quinn, Doremus, McCue & Russell. I believe he was raised in Long Branch, and he had a good reputation as a young lawyer and a citizen." (R. 947)

Lawn did not function as an attorney for the taxpayers. They retained other counsel even for the simplest transaction (R. 1005-6, 1076, 1115, 1479, 2168, 2230).

Suppressed evidence was used in the attempt to connect Lawn with the crimes charged.

There was no proof of a connecting link to or a stake in the crimes on the part of Lawn. The prosecutor sought to overcome these deficiencies by showing that Lawn had in fact received a payment of $15,000 from the Tavern partnership. The thesis of the prosecution was that this represented fruits to Lawn of the alleged crimes. As proof of the alleged link the prosecutor introduced in evidence a $15,000 check and its related stub entry (Exs. 61A and 61B, R. 1021, 2998-3001). But these were neither proof of any link nor matter properly brought into the trial. This was unconstitutionally secured evidence and previously stamped as unusable because it was obtained from Lawn in violation

of his privilege against self-incrimination; and two successive judicial orders had directed its suppression and return (R. 2871, 2873, 184).

These tainted documents were not returned by the Government but were repeatedly used with material effect during the trial and on the prosecutor's summation (R. 1019-22, 2598, 2603-7, 2657-8).

The history of Exhibits 61A-B.

Criminal informations had been filed in 1950 against the taxpayer-defendants and against Lawn as an aider and abettor, charging failure of the taxpayers to pay income taxes for 1946 (R. 2763-6, 2867). The defendants pleaded not guilty (R. 2765). These informations were not brought to trial (R. 249).

In July 1952, while the informations were pending, Lawn and his co-defendants were subpoenaed by the Federal Grand Jury to testify and furnish evidence concerning the same tax matters, among other things (R. 2784-8, 2867). Lawn was sworn and questioned by the Grand Jury and in response to the subpoena produced four documents, with two of which we are here concerned: one was the check for $15,000, payable to and endorsed by petitioner, drawn by Tavern Fruit Juice Co., a partnership, and dated November 7, 1945; the other was the corresponding check stub. These documents were respectively identified as Grand Jury Exhibits Nos. 2 and 4 on July 15, 1952 (R. 2798-2804).

On instructions from the Grand Jury, photostatic copies were made by the office of the United States Attorney on July 15, 1952, which then retained the same, the originals being returned to petitioner (R. 2802-3).

The Grand Jury shortly thereafter indicted the taxpayer-defendants and Lawn as an aider on the 1946 income tax liability already the subject of the criminal informations against them. Petitioner, with other individual defendants, moved

for dismissal of the indictments on the ground that their rights under the Fifth Amendment had been infringed by the compulsion to appear and produce records before the indicting Grand Jury. On March 27, 1953, these indictments were dismissed by Goddard, *D.J.*, because they had been obtained in violation of the petitioner's privilege against self-incrimination. *United States* v. *Lawn*, 115 F. Supp. 674 (S. D. N. Y. 1953). The Judge's opinion and order directed the Government to return the partnership and personal records (including Exhibits 61A-B) produced by the defendants before the Grand Jury (R. 2871, 2873). The Judge stated:

> "* * * the Government is directed to return, to the respective defendants, the partnership and personal records produced by them in response to the subpoenas." (R. 2871)

The order signed by Judge Goddard on April 29, 1953, stated:

> "Further Ordered that the plaintiff United States of America return to the respective defendants any and all partnership and personal records produced by them in response to subpoena duces tecum served upon them in July, 1952." (R. 2873)

None of the documents produced by the defendants were immediately returned. The Government appealed from the dismissal and on July 23, 1953 (R. 2874), while the appeal was pending and prior to the return of the tainted documents, the prosecutor obtained the present indictment which is in material respects identical with the 1952 indictments (R. 10-21, 149). The Government's appeal was dismissed on October 19, 1953 as not timely taken. *United States* v. *Roth*, 208 F. 2d 467 (2 Cir. 1953).

Lawn moved in advance of trial before Palmieri, *D.J.*, to dismiss the present—the 1953—indictment, for a hearing to suppress the illegal evidence and for a hearing to examine the uses which the Government had made of the illegal evi

dence, which it had not yet returned. Lawn further requested compliance with Judge Goddard's order to return the documents taken by the 1952 Grand Jury (R. 26).

Judge Palmieri denied the motions for a dismissal or a hearing because "the weight of the affidavits presented by the Government is much greater than that of the *post hoc propter hoc* and the conjectural arguments advanced by the defendants" (R. 183). Judge Palmieri, however, did order the return of the partnership and personal records produced by the defendants before the 1952 Grand Jury (R. 184). There is no indication that the Judge himself examined the 1953 Grand Jury minutes to satisfy himself as to the reliability of the affidavits presented by the Government in which it denied use of the non-returned tainted evidence.

The two documents which petitioner had produced under subpoena, marked as Grand Jury Exhibits 2 and 4 and described above, were *never returned*. On the contrary, they were introduced in evidence by the Government at the trial, identified respectively as Exhibits 61A and 61B. Circumstances which will be described in detail below prevented recognition of these exhibits by defense counsel and the court as the illegally obtained documents.

The prosecution and the Grand Jury had promised to provide the defendants with an itemized receipt for the documents improperly obtained (R. 2858), but they never did so. When a large batch of documents was finally returned, the defendants were then being represented by new counsel (R. 125, 2767-71) and neither Lawn nor the others could tell whether all of the documents taken from them had been returned.

The defendants made recurrent motions on the trial for a hearing to establish the use of illegal evidence in the prosecution. These motions were successfully blocked by Government affidavits asserting that the tainted documents had not been and would not be used in the prosecution or on the trial (R. 244-8, 1356, 1943-5, 2076-88, 2136-7, 2505, 2878-9, 2948-53, 2955-62).

Tainted evidence used on the trial.

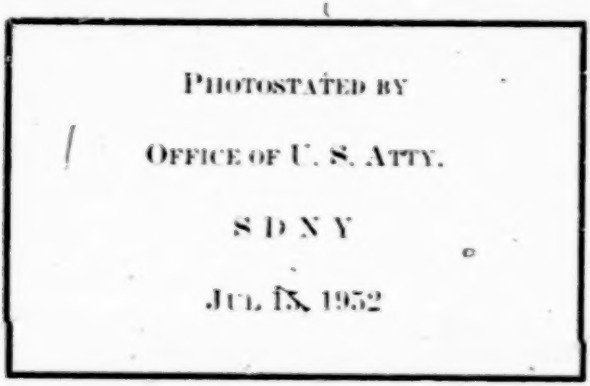
The prosecutor produced the tainted photostats of the $15,000 check and of the corresponding check stub book entry and offered them in evidence during the direct examination of his witness, the defendant Roth. He perforce could not testify to the source from which the Government had obtained these photostats. He was questioned preliminarily by the defendants concerning the handwriting and the signature on the documents and they were then admitted without objection (or this score of course) as Exhibits 61A-B (R. 1021, 2998-3001).

The first detection of the tainted character of these documents was made just before the appeal was argued in the Court below. Both sides of the check had been photostated on one sheet which had then been folded so as to give a front and back appearance. The two photostated sides of the check stub had been stapled together concealing the ostensibly blank inner sides. Close inspection of the inner sides of the photostats, during the pendency of the appeal, for the first time revealed physical markings showing that the photostats were the tainted copies made on July 15, 1952, by the prosecutor's office and taken from the originals produced by petitioner under command of the Grand Jury, as mentioned above. It was only when the inner sides of the photostats were exposed that the illegal source of the exhibits became apparent.

We have transmitted to this Court Exhibits 61-A and 61-B and they are also printed in the record (R. 2998-3001).

Lawn's contention *is not* that the *Grand Jury marks* were concealed but that the exhibits were so folded and stapled as to hide from view a *stamped marking* which revealed the exhibits to be among those which should have been returned pursuant to the orders of Judges Goddard and Palmieri.

On the inside of these exhibits, hidden from the viewer thereof, the following stamped marking appeared (R. 2999, 3001).



The brief opposing certiorari emphasizes that massive evidence "was obtained by the Government both prior and subsequent to the 1952 Grand Jury proceedings" (Br. 19). Papers so obtained prior to the Grand Jury proceedings were used before the Grand Jury by the Government and marked as Grand Jury exhibits, e.g., "G. J. Ex. —, 9 10 52 LFG."

Papers unlawfully obtained from the defendants under command of the Grand Jury were likewise marked as Grand Jury exhibits, e.g., "G. J. Ex. 2, 7 15 52, LFG" (R. 2998, 3001).

Accordingly, the source of the papers used on the trial by the prosecutor, i.e., whether papers originated from proper sources or whether they were those obtained in violation of the Fifth Amendment, was not determinable simply from the fact that a paper bore the Grand Jury's identification marking.

The stamp which ultimately betrayed the photostats as illegally procured papers, that is, the ones taken from Lawn's possession, was the stamped pink marking set forth above, showing that the check and check stub entry had been photostated by the office of the U. S. Attorney, S. D. N. Y., on July 15, 1952, the day on which Lawn appeared before the Grand Jury and produced the papers. This pink stamp did not appear on exhibits legally obtained by the Government.

During the trial itself the prosecutor and his staff had by affidavits and oral certifications blocked all inquiries demanded by the defendants to establish the origin and source of evidence used by the Government in this prosecution before the Grand Jury and on the trial. These affidavits certified to the Court and to defense counsel that no use would be or had been made on the trial of the papers which had been suppressed and which the prosecutor had twice been directed to return (R. 1943, 2083, 2948-53). The Court below approved the exercise of the discretion of the Trial Judge in accepting these certifications and refusing a hearing to the defendants (R. 2969).

It is incontrovertible in the present record that Exhibits 61A-B (R. 1021, 2998-3001) were two of the papers obtained in violation of the privilege against self-incrimination and ordered by two District Judges to be returned to Lawn, and it is incontrovertible that the prosecutor did not comply with the Judges' orders. It is further incontrovertible that the prosecutor did in fact use tainted evidence on the trial notwithstanding his recurrent certifications to the contrary. One such certification was filed at the close of the trial before sentence of two of the defendants. The opinion below does not discuss or challenge these incontrovertible facts.

Approval of use of tainted evidence.

The Court below condoned the use at the trial of the evidence unconstitutionally obtained, Exhibits 61A-B, reasoning that Lawn had suffered no harm "whatsoever" and was deemed to have waived his objection because his counsel had, generally, the opportunity of cross-examination (but not of any person having knowledge of what was produced to the Grand Jury) and had preliminarily inquired concerning the identity of the handwriting and signatures on the photostats. The Court below bottomed this ruling of harmless error on the Government's irregular offer of proof in the Court of Appeals that untainted copies of the documents were available for use. The opinion below states:

> "Further, on this appeal the government offers to prove that other copies of the same documents were in its possession months before the 1952 proceedings and that these 'untainted' copies could have been easily substituted at trial if the discrepancy had been pointed out by objection of defense counsel. Lawn therefore suffered no harm whatsoever and has obviously waived his objection." (R. 2971)

In thus going outside the record, the Court below was erroneously led to a further series of material errors. There were no other copies of Exhibits 61A-B in this prosecutor's possession before the 1952 proceedings or at the time of the trial. The prosecutor did not obtain the so-called "untainted" copies until January, 1956, or nearly a year after the trial and just before the argument of the appeal below. After being advised that petitioner's appellate counsel had detected the use of unconstitutional evidence, the prosecutor then set about for the first time to seek out and secure the copies referred to as "untainted" by the Court below. Seemingly these 1956 copies were obtained from a New Jersey Grand Jury's custody without petitioner's knowledge or consent (R. 2977-9).

The naked facts are that the prosecutor used Exhibits 61A-B on the trial and these were the only copies in his possession or that he had ever seen up to and at that time.

So far as this record goes, there was no other copy of Exhibits 61A-B in existence, "untainted" or otherwise. Since the original papers were tainted in 1952, the copies made in 1956 fall under the same ban as deriving from the lead or clue given in the vitiated New York proceedings.

It is further clear from the record that the tainted documents were used on the trial as a lead or clue to considerable testimony adduced by the prosecutor (R. 1018-22, 1073, 1074-5).

Suffice to say that compliance with orders to return all tainted evidence would have avoided the cumulative series of errors because the unusable papers would not have then been available to or used by the prosecutor on the trial.

SUMMARY OF ARGUMENT.

1. The prosecution's use of illegally secured evidence, in violation of the orders of two United States District Courts, deprived the petitioner of the protection afforded him by the Constitution of the United States (1) against compulsory self-incrimination and (2) to due process of law in the conduct of a criminal trial. Timely objection was taken to the illegal actions of the prosecutor on the motions to suppress and return the illegally secured evidence. This wrong to the petitioner cannot be cured by an offer of proof by the Government in the Court of Appeals to produce allegedly untainted evidence equal to the tainted evidence which was improperly admitted. Nor can the violation of petitioner's rights be condoned on the ground that further objection was not made to the use of the evidence, especially in light of (1) the constant reiteration by the prosecutor, sometimes under oath, that he was not using the tainted evidence and (2) the manner in which the stamp, which would have revealed the tainted evidence for what it was, was concealed at the time the evidence was offered in proof.

2. The misconduct of the prosecutor in the course of the trial deprived the petitioner of his rights to a fair trial. Both the due process clause and the exercise of this Court's duty to supervise the administration of criminal justice in the federal courts call for a reversal of this conviction. The introduction of illegally secured evidence after repeated assurances to the court that such evidence would not be used; the assertion in his summation that the United States vouched for the truth of the testimony of witnesses who were confessed criminals and perjurers; and charges made by the prosecutor against the petitioner in his summation which had no basis in fact, each call for the application of the *Berger* rule. These errors were so fundamental that the failure to make specific objection cannot warrant the Court's approval of this misconduct by affirming a conviction, espe-

cially in light of the weakness of the case against this petitioner. The trial court should have been alert to this misbehavior without the necessity for objection from counsel, and, in any event, objection was unnecessary since the trial court could do nothing to draw the poison which the prosecutor had injected.

3. It was a deprivation of the petitioner's constitutional rights to refuse a hearing in the course of the trial to determine whether the prosecutor was making improper use of illegally secured evidence after petitioner had once established that some such evidence was improperly offered by the prosecution and admitted by the court.

4. The petitioner could not properly be convicted of aiding and abetting the commission of a crime where the alleged principal was not found guilty and there was no evidence, absent the guilt of the alleged principal, that any such crime had been committed.

5. Section 145(b) of the Internal Revenue Code of 1939 does not make it a felony for a taxpayer who has properly disclosed his sources of income and properly reported his tax liability to conceal his assets or divert his assets to uses other than the payment of taxes.

6. The evidence against petitioner was insufficient to go to the jury or sustain the petitioner's conviction and under *Yates* v. *U. S.*, "the evidence in this record would be palpably insufficient upon a new trial."

I.

THE USE OF ILLEGALLY OBTAINED EVIDENCE, IN VIOLATION OF COURT ORDERS FOR ITS SUPPRESSION AND RETURN, WAS FUNDAMENTAL ERROR, INFRINGING THE PETITIONER'S PRIVILEGE AGAINST SELF-INCRIMINATION AND DEPRIVING HIM OF LIBERTY WITHOUT DUE PROCESS OF LAW.

Unconstitutional evidence—Exhibits 61A-B (R. 1021, 2998-3001), material to the prosecution, was used to convict petitioner.

This evidence had been adjudicated before the trial as illegally obtained in violation of the privilege against self-incrimination and stamped unusable in this prosecution. The illegality resulted in the dismissal of the 1952 indictments which had charged the same crimes as those tried under the later indictment. *U. S. v. Jaben*, 115 F. Supp. 674 (Goddard, *D.J.*) (R. 2866-71), untimely appeal dismissed, sub. nom. *U. S. v. Roth*, 208 F. 2d 467 (2 Cir. 1953). The prosecutor conceded that this ruling was binding on this prosecution (R. 149, 168, 171, 1348-9); "that is binding on the Court, on the Government and everybody else at this time," said the prosecutor on the trial (R. 1348-9). See *Globe v. Gibralter Ent.*, 85 F. Supp. 410, 414 (D. N. Mex. 1949).

The prosecutor was ordered before the trial to return this (and other) illegally obtained evidence, which had vitiated the first indictments. Two District Judges, Goddard, *D.J.* and Palmieri, *D.J.*, so ordered (R. 183, 2870-1, 2873). Neither order was complied with.[1]

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[1] Judge Goddard's order was made March 27, 1953. The Government appealed on May 5, 1953, 208 F. 2d, at 469. The Government meanwhile obtained a new and sealed indictment on July 23, 1953 while still in possession of the suppressed evidence (R. 31). The new indictment was kept sealed until January 26, 1954 (R. 1). However, in September 1953 the Government obtained a stay, pending its appeal, of the return of the suppressed records (R. 31). The appeal was dismissed on October

The prosecutor produced and used the suppressed documents, Exhibits 61A-B, on the trial (R. 1018-21, 1074-5) and with telling effect on the summation (R. 2598, 2603, 2604, 2605, 2606, 2607, 2627). They unquestionably influenced the jury in its verdict.

Obedience on the part of the prosecutor to either of the pre-trial Court orders to return the tainted documents to petitioner would have precluded the Government's error in using such tainted documents on the trial. The consequences of that error are to be visited on the Government, not the petitioner, since the law bars absolutely any use, whether advertent or inadvertent, of illegal proof.[2]

Rarely is a court confronted with a situation in which the prosecution has obtained a conviction based upon evidence previously held inadmissible. When the prosecution introduces evidence which has previously been adjudicated inadmissible and which the court has already ordered suppressed and returned to the accused, such use of the evidence constitutes a clear violation of the constitutional privilege and evident denial of due process of law.

> "It has long since ceased to be true that due process of law is heedless of the means by which otherwise

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19, 1953, rehearing denied December 11, 1953, 208 F. 2d 467. The District Court on October 21, 1954 again ordered the tainted records to be returned. 16 F. R. D. 268 at 271; R. 184. The trial commenced January 11, 1955 (R. 6). The prosecutor ultimately produced Exhibits 61A-B at the trial, on January 26, 1955 (R. 1019).

[2] *Mesarosh* v. *U. S.*, 352 U. S. 1 (1956); *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115 (1956), *McDonald* v. *U. S.*, 335 U. S. 451 (1948); *Nardone* v. *U. S.*, 308 U. S. 338 (1939); *Go-Bart Importing Co.* v. *U. S.*, 282 U. S. 344 (1931); *Gouled* v. *U. S.*, 255 U. S. 298 (1921); *Amos* v. *U. S.*, 255 U. S. 313 (1921); *Silverthorne Lumber Co.* v. *U. S.*, 251 U. S. 385 (1920); *Weeks* v. *U. S.*, 232 U S. 383 (1914); *Bram* v. *U. S.*, 168 U. S. 532 (1897); *Boyd* v. *U. S.*, 116 U. S. 616 (1886); *McGinnis* v. *U. S.*, 227 F. 2d 598 (1 Cir. 1955); *U. S.* v. *Coplon*, 185 F. 2d 629, 640 (2 Cir. 1950), Judge L. Hand.

> relevant and credible evidence is obtained. This was not true even before the series of recent cases enforced the constitutional principle that the States may not base convictions upon confessions, however much verified, obtained by coercion. These decisions are not * * * sports in our constitutional law but applications of a general principle." *Rochin* v. *California*, 342 U. S. 165, 172-73 (1952).

Such use would be plainly incompatible with the standards which this Court has established for the integrity of the administration of criminal justice in the federal courts. *McNabb* v. *U. S.*, 318 U. S. 332 (1943).

The Court of Appeals' opinion disposes of the infraction of constitutional rights on the ground that the error was harmless or waived (R. 2971). In so ruling the Court of Appeals relied on the prosecutor's offer of proof made on the appeal, that "on this appeal the government offers to prove that other copies of the same documents were in its possession months before the 1952 proceedings and that these 'untainted' copies could have been easily substituted at trial if the discrepancy had been pointed out by objection of defense counsel" (R. 2971).

The reference to other copies in the Government's possession is to a copy of the questioned papers which were in the possession of a Grand Jury in New Jersey. The prosecutor in this case did not have in his own possession in New York any copies of the papers other than the tainted copies. However, in January 1956 during the pendency of the appeal herein the New York prosecutor sent to New Jersey and obtained a photostat from the files of the New Jersey Grand Jury of Exhibits 61A-B (R. 2979).

The appraisal by the Court of Appeals of constitutional error as harmless and the assessment of waiver against petitioner was fundamental error of fact as well as law.

Material use of the illegal evidence.

The material impact on the petitioner of the interdicted evidence may be judged from the forceful use of it by the prosecutor, when to vindicate the oral testimony of the Government witnesses he argued to the jury "even if you have some questions about Lubben and Roth because of their background, you can't deny the documents. They do speak for themselves." (R. 2604).

> "Now here is a piece of paper, Exhibit 61A, a check signed by Frank Livorsi, the signature unquestioned, to Howard Lawn, endorsed by Howard Lawn, $15,000 check, dated November 7, 1945." (R. 2604)
>
> "He [Lawn] got a lot of money out of this. * * * he must have been doing something to get that." (R. 2598)
>
> "You heard about his $15,000 legal fee from Tavern." (R. 2598)

Parenthetically, the description of the item as a legal fee was a transgression. The sole testimony was that the $15,000 was a loan from Giglio to Lawn which had partially been repaid by Lawn (R. 1019). It was not an expense item of the partnership but a charge to the account of a partner, Giglio (R. 1021).

The tainted documents were also used as leads and clues to considerable oral testimony (R. 1018-22, 1073, 1074-5).

Cannot speculate on evidence not used.

The prosecutor's post-trial realization or contention that evidence *not used* was available, does not absolve trial use of constitutionally tainted evidence. It was an unparalleled extension of appellate power of review for the Court below to accept as proof an offer on appeal to establish that untainted proof "could have been easily substituted at trial if the discrepancy had been pointed out by objection of defense counsel" (R. 2971). Such reliance by the Court on a mere offer also denied to petitioner his constitutional rights to be confronted by witnesses, to cross-examine them and to refute the offer of proof made on the appeal.

This Court laid down the applicable rule in *McDonald* v. *U. S.*, *supra*, in reversing convictions obtained on tainted evidence, as at bar:

> "If the property had been returned to McDonald, it would not have been available for use at the trial. We can only speculate as to whether other evidence which might have been used against Washington would have been equally probative." (335 U. S. at p. 456.)

The substitute copies of Exhibits 61A-B proffered on the argument of the appeal in the Court of Appeals, obtained in 1956 from the files of the New Jersey Grand Jury, could in no event have been used on the trial even if procured in 1955 or earlier because this prosecutor had no legal right to use material in the files of the New Jersey Grand Jury.

In *In Re April 1956 Term Grand Jury*,[3] the Court held (p. 272):

> "* * * we also hold that persons, nonmembers of the grand jury, thus having access to said records and documents, have no right to use them for any purpose whatsoever except to assist the grand jury in its work. Such persons may not in any manner use these records and documents, or any information acquired therefrom, for any other purpose, and specifically for any civil purpose, such as tax collection or otherwise."

Constitutional error is never harmless.

Constitutional error is, as matter of law, never harmless since "The proponent before the court is not the petitioner but the Constitution of the United States."[4]

The ruling below that the unconstitutional evidence could be deemed to be harmless is squarely contrary to a solid line of authority.[5]

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[3] 239 F. 2d 263 (7 Cir. 1956).

[4] *Chessman* v. *Teets*, 353 U. S. (1957).

[5] *Kremen* v. *U. S.*, 353 U. S. 346 (1957); *Helton* v. *U. S.*, 221 F. 2d 338 (5 Cir. 1955); *Wrightson* v. *U. S.*, 222 F. 2d 556, 561 (D. C. Cir.

In *U. S. v. Grunewald*,[8] the dissent of Judge Frank stated the true rule (p. 378):

> "* * * the error here consisted of an invasion of a constitutional right. Such an error cannot be deemed harmless."

There was no waiver of fundamental rights.

The Court below approved a use by the prosecutor of tainted evidence which was in violation of two court orders. The Court found waiver of petitioner's fundamental rights because: petitioner's counsel conducted a preliminary inquiry when the exhibits were offered concerning the signatures on the documents and did not renew the objections to their use, seasonably made and sustained before trial.

The posture of the prosecution at this time was that (i) seasonably in advance of trial petitioner had objected to the Government's use of Exhibits 61A-B by motions granted but not obeyed to return this evidence to petitioner; (ii) motions on the trial to investigate the use of suppressed evidence and leads and clues therefrom had been made and repeatedly denied (R. 247, 1356, 1945, 2085-6, 2136-7, 2505); (iii) unequivocal certifications repeatedly by the prosecution that none of the suppressed evidence had been or would be offered or used on trial, had been made and given (R. 82, 1943, 2083, 2948-9, 2949-53); and (iv) the telltale marks identifying the exhibits as illegally procured were physically hidden by the prosecutor's folding and stapling of the exhibits and nothing appeared reasonably to warn the petitioner of the illegality of the offer.

1955); *U. S. v. Shotwell Mfg. Co.*, 225 F. 2d 394, 406 (7 Cir. 1955), cert. granted 352 U. S. 997 (1957), and see *U. S. v. Heath*, 147 F. Supp. 877, 878 (D. Haw. 1957); *Williams v. U. S.*, 237 F. 2d 789 (D. C. Cir. 1956).

[8] 233 F. 2d 556 (2 Cir. 1956), rev'd 353 U. S. 391 (1957); and see, also, *U. S. v. Kraus*, 270 Fed. 578, 581-2 (S. D. N. Y. 1921, per Learned Hand, *D.J.*).

As matter of law and fact there was no waiver because (1) the said motions made seasonably before trial without more saved petitioner's rights; (2) the said unequivocal certifications of the prosecutor bars waiver; (3) the prosecutor had to obey the court orders and could not use the fruits of his disobedience; (4) there was no intentional relinquishment of a known right; (5) the use of tainted evidence seriously affects the fairness and integrity of prosecutions.

1. The motions seasonably made before trial for the return of the documents and the suppression thereof saved petitioner's rights against any claim of the waiver or relinquishment thereof and without need for trial objection.[7]

In *Cogen* v. *U. S.*,[8] this Court pointed out that on the trial the Court will not ordinarily permit the collateral issue of the source of otherwise admissible evidence to be tried. The way in which to preserve a defendant's rights and to prevent a waiver is to move seasonably in advance of trial as did the petitioner here for a return of tainted documents. This Court appositely held (p. 223):

> "Hence, a defendant will, ordinarily, be held to have waived the objection to the manner in which evidence has been obtained unless he presents the matter for the consideration of the court seasonably in advance of trial; and he does this commonly by a motion made in the cause for return of the property and for suppression of the evidence."
>
> • • • • •
>
> "The disposition made of the motion will necessarily determine the conduct of the trial and may vitally affect the result."

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[7] *Cogen* v. *U. S.*, 278 U. S. 221 (1929); *Waldron* v. *U. S.*, 219 F. 2d 37, 41 (D. C. Cir. 1955); *Blok* v. *U. S.*, 70 A. 2d 55, 57 (Mun. Ct. App. D. C. 1949), aff'd 188 F. 2d 1019 (D. C. Cir. 1951); *U S.* v. *Wheeler*, 149 F. Supp. 445, 447 (W. D. Pa. 1957).

[8] *Supra*, ftn. 7.

Once a court has disposed of a point concerning the admission or exclusion of evidence including its tainted character, litigants may—indeed must—proceed to try the case accordingly.

In *Waldron* v. *U. S.*,[9] the government contended as at bar, that there was a waiver by failure to object when the evidence was offered. The Court held (p. 41):

> "The movant has a right to renew his point; it would be safer and more skillful to interpose an objection when the evidence is offered; but we think he is not required to do so. He does not waive it and is not barred from pressing it upon appeal, if he merely abides the court's ruling and tries the remainder of his case accordingly."
>
> • • • • •
>
> "It seems clear to us that a ruling on a motion to suppress evidence becomes a controlling rule in the case just as does a ruling made during a trial. • • • Once the court has disposed of a point concerning the admission or exclusion of evidence, litigants must proceed to try the case accordingly."

In *U. S.* v. *Wheeler*,[10] the Court went so far as to forbid a renewal of the objection on the trial and it held (p. 447):

> "I advert to the rule of law that a ruling on motion to suppress evidence becomes the controlling rule in the case as does a ruling made during trial. The objection may not be renewed at the trial."
>
> • • • • •
>
> "The defendant is saved harmless in view of the fact that he is not required to renew his motion or press his objection, since he is not barred from pressing it upon appeal, if he merely abides the court's ruling and tries the remainder of his case."

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[9] 219 F. 2d 37 (D. C. Cir. 1955).

[10] 149 F. Supp. 445 (W. D. Pa. 1957).

2. Time after time the prosecution, on oath and in the most emphatic terms, asserted its scrupulous compliance with the order, accepting it as laying down the conditions under which the trial was to be held. To quote but one of many similar statements, the prosecutor said:

> "I would like to state again, if your Honor please, positively, finally, and affirmatively—I will do it under oath or any way that I possibly can—that I am positive that there has been nothing in this case in the trial or before the grand jury that in any way comes from those partnership records which Judge Goddard found to have been illegally obtained. I am certain of that. I have made every possible effort, inquiry, to determine that. I have submitted affidavits twice to this Court, not only from myself, but from each person who worked on the case." (R. 2083)

Even as late as the sentencing date the prosecutor averred, along with all of his associates, that no tainted or proscribed evidence was or had been used on the trial (R. 2948-53). Such claim bars any contention of waiver.

In *U. S.* v. *Costello*,[11] the Court stated the rule of law and impeccable logic (p. 896):

> "In addition, the Assistant United States Attorney's adamant insistence to the very last moment of the trial that his evidence did not stem from wire taps is hardly consistent with his claim that the defendant should be held to have waived any objection to them."

3. The Court below in assessing waiver against petitioner in effect says that the District Court orders need only have been obeyed if on the trial the petitioner had policed the prosecutor's duty of obedience to judicial orders. This is clearly not the law. In *Rea* v. *U. S.*,[12] this Court laid it down as the law of the land:

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[11] 145 F. Supp. 892 (S. D. N. Y. 1956), rev'd o. g. — F. 2d — (2 Cir. 1957).

[12] 350 U. S. 214 (1956). Government officials likewise must obey court orders. *Land* v. *Dollar*, 190 F. 2d 366 (D. C. Cir. 1951), cert. dism. 344 U. S. 806 (1952); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952).

> "The obligation of the federal agent is to obey the Rules. They are drawn for innocent and guilty alike. They prescribe standards for law enforcement. They are designed to protect the privacy of the citizen, unless the strict standards set for searches and seizures are satisfied. That policy is defeated if the federal agent can flout them and use the fruits of his unlawful act either in federal or state proceedings."

The device of photostating before returning the tainted evidence cannot relieve the prosecutor from obedience to court orders. *People* v. *Berger*, 44 Cal. 2d 459, 462 (1955).

4. There was here no intentional relinquishment of a known right. The unconstitutional use was not apparent to the petitioner at the time; the physical form of the evidence concealed telltale marks which identify it as illegally procured. These telltale identifying marks on the inner side of the photostatic exhibits were hidden from view because the inner side had been stapled or folded over. The stamps showed that the photostats were those illegally exacted and made on July 15, 1952, by the United States Attorney under the coercion of the Grand Jury subpoena. These stamps could be exposed only by removal of the stapling or unfolding the photostats.

There was no occasion on the trial to open the folds and remove the staples, folded or placed there by the prosecutor, to examine what ostensibly would only be the blank insides of the photostats. Thus, the petitioner was not on notice that the exhibits were those ruled tainted by Judge Goddard.

The preliminary questioning to which the Court below referred prior to the introduction of the tainted evidence was conducted in the light of the vouchers from the prosecutor that no tainted evidence had been or would be used and was limited by the Court's denial of a hearing on the use of tainted evidence. The witness (Roth), who was the one preliminarily questioned, did not supply the exhibits to the 1952

Grand Jury and perforce could not testify to the source to which the prosecutor had turned to obtain the papers which he was then offering in evidence. He was examined merely to identify the handwriting and the signatures (R. 1022).

In addition petitioner throughout the trial was demanding a hearing so that he could ascertain what tainted evidence had been used either directly or as leads and clues. The lack of specific objection at the precise moment when the photostats were offered in evidence was not to be taken as a conscious relinquishment of the repeated assertions of unconstitutional procedure on the prosecutor's part and misuse of illegal evidence.[13]

As in *Emspak*, to find waiver here "would be to violate this Court's own oft-repeated admonition that the courts must indulge every reasonable presumption against waiver of fundamental constitutional rights."[14]

The prosecutor's certifications and the folding and stapling of the photostats concealed the prosecutor's course. As there was no warning of the prosecutor's course, so also there was no consent or waiver. There was not here "an intentional relinquishment or abandonment of a known right or privilege."[15]

5. Any claim of waiver poses inescapable dilemmas for the government.

The Court below and the government perforce have taken the erroneous view that government agents need not obey court orders if defendant's counsel does not adequately police the orders.

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[13] *Emspak* v. *U. S.*, 349 U. S. 190, 195, 198 (1955); *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938).

[14] *Emspak* v. *U. S.*, cit. *supra*, n. 13, at p. 198.

[15] *Johnson* v. *Zerbst*, 304 U. S. 458, 463 (1938); see, also, *Glasser* v. *U. S.*, 315 U. S. 60, 70 (1942).

But more than that. If the external markings on these exhibits were sufficient to warn petitioner of his "known right," then the warning was even clearer to the prosecutor that he was using tainted evidence and in consequence the prosecutor knowingly used illegally obtained evidence in violation of two court orders, and his solemn oath to the contrary was consciously incorrect.

Indeed, the prosecutor in his brief to the Court of Appeals makes an explicit statement which comes very close to an admission that the suppressed documents were knowingly used (Br. p. 64):

> "• • • the documents bore grand jury markings on their face, making their source as clear to Lawn and his counsel as to the prosecutor."

The prosecution repeatedly and solemnly gave lulling assurances of the certainty that no suppressed documents were being used in any way. We are not here primarily concerned with whether the prosecution knowingly used the suppressed documents. Fundamental error was committed even if the use was inadvertant. We emphasize, however, that every time the prosecution charges the petitioner with intelligent waiver of his privilege, it convicts itself, *a fortiori*, of wilfull violation of the petitioner's rights, wilfull disobedience of two court orders, and false swearing.

Convictions so obtained are subject to collateral attack whether or not there is an objection on the trial.[16]

But irrespective of lack of trial objection, this is a case where there can be no waiver because "The dignity of the United States Government will not permit the conviction of any person on tainted testimony."[17]

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[16] *Mooney* v. *Holohan*, 294 U. S. 103 (1935).

[17] *Mesarosh* v. *U. S.*, 352 U. S. 1 (1956) at p. 9 (majority) semble at p. 25 (dissent); see, also, *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115, 124 (1956); and see *U. S.* v.

The use by the prosecutor of tainted and proscribed documents is a use which would "seriously affect the fairness, integrity or public reputation of judicial proceedings."[18]

II.

THE PROSECUTOR'S CONDUCT DEPRIVED PETITIONER OF A FAIR TRIAL.

Due process was not afforded to petitioner Lawn here. The trial did not meet federal standards for a criminal prosecution.

This Court has, from time to time, admonished prosecuting counsel that it is their duty to see that justice is done and not to secure convictions. *Berger* v. *United States*, 295 U. S. 78 (1935); *Viereck* v. *United States*, 318 U. S. 236, 248 (1943); *Jencks* v. *United States*, 353 U. S. 657 (1957). It is this fundamental precept of Anglo-American Law which the prosecuting attorney in the instant case has so flagrantly violated.[19]

Gordon, 236 F. 2d 916 (2 Cir. 1956), where the Court said: "American prosecutors must learn to adjust themselves to these obstacles. The purpose of the Bill of Rights was, as Madison declared, 'to oblige the government to control itself'." (p. 920).

[18] *U. S.* v. *Atkinson*, 297 U. S. 157, 160 (1936); semble, *Clyatt* v. *U. S.*, 197 U. S. 207, 221, 222 (1905); *New York Central R.R.* v. *Johnson*, 279 U. S. 310, 318-19 (1929); *Brasfield* v. *U. S.*, 272 U. S. 448, 450 (1926), and cases there cited. The Solicitor General's brief opposing certiorari argued that production to the 1952 Grand Jury by petitioner of Exhibits 61A-B pursuant to its subpoena constituted a waiver for purposes of trial of constitutional rights (Br. 24). The authorities repudiate this. *In re Neff*, 206 F. 2d 149, 152 (3 Cir. 1953); *Poretto* v. *U. S.*, 196 F. 2d 392, 394 (5 Cir. 1956); *Ballantyne* v. *U. S.*, 237 F. 2d 657, 665 (5 Cir. 1956). Such production is under coercion and duress, *Grunewald* v. *U. S.*, 353 U. S. 391 (1957), and cannot bottom a claimed waiver. *Whitley* v. *U. S.*, 237 F. 2d 787 (D. C. Cir. 1956); *Judd* v. *U. S.*, 190 F. 2d 649, 651 (D. C. Cir. 1951).

[19] The English courts call for reversal of conviction when the prosecutor has overstepped the boundaries of fair play. In *Rex* v. *Sugarman*,

The witnesses on whom the Government's case rested were Roth and Lubben. These men admittedly were perjurers, black marketeers, and were admittedly guilty of innumerable crimes. Their credibility had been severely shaken by proof of their criminal predilections and their almost habitual perjury (R. 2588-9).

Roth had pleaded guilty to filing false financial statements with the R. F. C. (R. 1251). He was not yet under sentence on that charge because his lawyers had successfully persuaded the court to leave him free to "cooperate" with the prosecution in the case at bar (R. 1274-85) a fact making his testimony suspect. Cf. *Ilford* v. *United States*, 282 U. S. 687, 693 (1931). He had pleaded guilty to all the charges in the indictment in the case involving these defendants, for which he was not yet sentenced (R. 981). He ultimately received a suspended sentence at the recommendation of the United States Attorney (R. 8). He admitted lying on the stand in this case (R. 1261-2), before the grand jury (R. 1270, 1295), and before the Kefauver Committee (R. 1326). He confessed to having committed perjury in a New Jersey receivership case (R. 1294). He filed false income tax re-

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29 Cr. App. Rep. 109, 114-15 (1935), Lord Chief Justice Hewart said, in a case in which prosecuting counsel had suggested, as in the case at bar (see p. 39, *infra*), that the defendant was guilty of crimes other than those with which he was charged:

> "It cannot be too often made plain that the business of counsel for the Crown is fairly and impartially to exhibit all the facts to the jury. The Crown has no interest in procuring a conviction. Its only interest is that the right person should be convicted, that the truth should be known, and that justice should be done. It would be deplorable if any counsel for the Crown should refuse to stand on the real strength of his case and think that he can strengthen and support it by things collateral in a manner contrary to the letter and spirit of English law. By so doing he can only weaken his case and may prevent a verdict which ought otherwise to be obtained. * * *
>
> "The Court has no alternative in this case, whatever its merits or demerits otherwise may be, but to allow the appeal and quash the conviction."

turns for himself in 1944, 1945, 1946 (R. 1237), and 1948 (R. 1257), as well as for two clients (R. 1094). And, with all the casualness of a totally amoral person, he admitted bribing O. P. A. officials (R. 1029). Lubben was no different. He blandly admitted over and over again that in various proceedings and while under oath he had perjured himself. "I lied," he frequently said (R. 378, 433, 435, 437, 439, 450, 472, 473, 672, 673, 675, 686).

Lawn's unblemished character (R. 947) and his record by themselves were more than enough to counterbalance the uncorroborated government witnesses, Roth, who was "cooperating" to save himself, and Lubben, a like character.

To offset Lawn's weight the prosecutor became an unsworn witness not subject to cross-examination; he threw onto the scales the prestige of his own person and that of the whole United States Attorney's office. He told the jury

> "I vouch for Lubben. The Government put Lubben on the stand because they thought that Lubben could be vouched for.
>
> "I vouch for Roth also * * *.
>
> "I vouch for them and I will explain precisely why I do in just a moment, but I vouch for them. When I say 'I,' I am referring to the District Attorney's office, and I merely represent them. We vouch for them because we think they are telling the truth." (R. 2587-8)

And again, about Roth:

> "* * * I think he told the truth." (R. 2592)

There was no doubt that the Government felt it necessary to reinforce the testimony of such persons if the jury were to bring in a verdict on the basis of their tales. It could not bolster their story by record evidence. The prosecutor, therefore, resorted to his own evidence by way of "vouching" for them as the only additional support available to avoid the collapse of his case.

This self-evident transgression needs no extended argument to demonstrate its deviation from minimum standards for a federal prosecution. Like conduct has been appropriately described as "a weighted foul blow by the District Attorney."[20]

This demonstrated anxiety to convict rather than to permit justice to be determined on the proofs did not conform to the standards for prosecution mandated by this Court.[21]

It is not within the competence of a prosecutor to prejudice a defendant by personal guaranties of guilt, insinuating personal knowledge to the jury or like misbehavior, as did the prosecutor at bar.[22]

The fundamentals of a fair trial preclude resort to the methods used here even in a case in which guilt may be convincing.

The New York Court of Appeals, in complete accord with this Court, has said in *People* v. *Savvides* (p. 558):[23]

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[20] *People* v. *Nicoll*, 3 App. Div. 2d (N. Y.) 64, 79 (4th Dept. 1956).

[21] *Berger* v. *U. S.*, 295 U. S. 78, 88-9 (1935); *Nalli* v. *U. S.*, 240 F. 2d 707, 710 (5 Cir. 1957); *Steele* v. *U. S.*, 222 F. 2d 628, 631 (5 Cir. 1955); *U. S.* v. *Murphy*, 222 F. 2d 698, 700 (2 Cir. 1955). Surely this Court and the New York courts are in full accord on the applicable standards of prosecutions. The New York courts invariably strike down convictions when the prosecutor undertakes to vouch for his witnesses or otherwise misconducts himself. *People* v. *Lotello*, 1 N. Y. 2d 436, 439 (1956); *People* v. *Savvides*, 1 N. Y. 2d 554 (1956); *People* v. *Tassiello*, 300 N. Y. [illegible] 430 (1950); *People* v. *Taylor*, 2 App. Div. 2d (N. Y.) 977, c. 17 (2d Jt. pt. 1956); *People* v. *Reimann*, 266 App. Div. (N. Y.) 505 (1st Dept. 1943); and see *People* v. *Ochs*, 3 N. Y. 2d 54 (1957).

[22] *Berger* v. *U. S.*, 295 U. S. 78 (1935), and see cases cited by this Court on p. 89; *Boyd* v. *U. S.*, 142 U. S. 450, 459 (1892); *Snipes* v. *U. S.*, 230 F. 2d 165 (6 Cir. 1956); *MacDonald* v. *U. S.*, 264 Fed. 733 (1 Cir. 1920); *Miller* v. *Territory of Oklahoma*, 149 Fed. 330, 339 (8 Cir. 1906); *People* v. *Mleczko*, 298 N. Y. 153 (1948); *People* v. *Minkowitz*, 220 N. Y. 399 (1917); *People* v. *Wolf*, 183 N. Y. 464 (1906); *People* v. *Swanson*, 278 App. Div. (N. Y.) 846, c. 2 (2d Dept. 1951); *People* v. *Maestry*, 167 App. Div. (N. Y.) 266 (1st Dept. 1915).

[23] 1 N. Y. 2d 554 (1956); and see, also, *McClure* v. *State*, 95 Tex. Crim. R. 53 (1923); *cf. Chessman* v. *Teets*, 353 U. S. [illegible] (1957).

> "Convincing though proof of guilt may be, * * * we could here affirm 'only if we were to announce a doctrine that the fundamentals of a fair trial need not be respected if there is proof in the record to persuade us of defendant's guilt.' [citation omitted] We were not in *Mleczko*, and we are not now, prepared to announce such a doctrine."

The minimum to offset the transgression was for the Judge to have charged, as requested, that in determining conflicts in the testimony, government witnesses are not entitled to any more credence than other witnesses (R. 2762). This request was denied and exception taken (R. 2762) thereby underscoring the prosecutor's summation.

The violation in this case of standards of a fair trial does not rest merely with this aspect of the summation albeit this was enough irrevocably to taint the conviction.

The prosecutor over-zealously went further. His thesis on summation was not that the jury should convict Lawn because of record proof of the crimes charged but because of the personal characteristics which the prosecutor chose to attribute to Lawn. It was not tax evasion conduct which the prosecutor told the jury it should stamp as wrong.

The prosecutor told the jury that the kind of conduct which it was called upon to approve or disapprove was the conduct of people like the defendants because Roth had allegedly threatened to kill Lubben (R. 2673-4)[24] and presumably the petitioner was to be placed in the same category because of his business association with a Roth.

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[24] The prosecutor told the jury after reciting Roth's threat to kill: "* * * these are the kind of human beings that must in some way be prevented from continuing this kind of conduct; that you must, not only for the good of the community, as far as they are concerned, but for the good of other persons, to prevent it from happening again, tell the whole community, and you are the voice now of the community, that this kind of conduct is wrong." (R. 2673-4) Roth was not on trial, having pleaded guilty.

This sought to influence the action of the jury by reference to a presumed public clamor. This falls short of due process to defendants.[25]

The prosecutor argued to the jury that Lawn was guilty of collateral crimes not material or established by the evidence, crimes with which he had never even been charged and which had no reference whatsoever to the crimes being tried. Because his own witnesses had indulged admittedly in evasion of personal income taxes, fixing, and bribery, the prosecutor thought it desirable to accuse Lawn of the same illegal acts, Lawn's alleged personal tax evasion, fixing, bribery, physical threats (R. 2600-8, R. 2674) although the prosecutor could not support his claims. "The heart of this case is fixing, it is bribery" (R. 2587). The prosecutor admitted that part at least of such charges were "interpolated" (R. 2607-8).

Convictions so obtained may not stand.[26]

During the trial the same prosecutor proclaimed before the jury the probability in his opinion that Lawn would intimidate or tamper with the witness Roth (R. 1333-4); and that Lawn would improperly approach another Government witness (R. 1591). Justification was lacking for such accusations placed before the jury. At all events this was highly prejudicial conduct of the prosecutor.[27]

The prosecutor set himself up as a judge; he proclaimed to the jury that his witness Lubben was properly conducting himself.[28]

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[25] *Boyd* v. *U. S.*, 142 U. S. 450, 459 (1892); *Benham* v. *U. S.*, 215 F. 2d 472, 474 (5 Cir. 1954); *People* v. *Esposito*, 224 N. Y. 370, 376 (1918); *People* v. *Fielding*, 158 N. Y. 542 (1899).

[26] *Snipes* v. *U. S.*, 230 F. 2d 165 (6 Cir. 1956); *Coulston* v. *U. S.*, 51 F. 2d 178 (10 Cir. 1931); *Pierce* v. *U. S.*, 86 F. 2d 949 (6 Cir. 1936); *cf. MacDonald* v. *U. S.*, 264 Fed. 733 (1 Cir. 1920); and see *People* v. *Brown*, 2 App. Div. 2d (N. Y.) 202 (4th Dept. 1956).

[27] *People* v. *Nicoll*, 3 App. Div. 2d (N. Y.) 64, 78 (4th Dept. 1956).

[28] See especially R. 429, 467, 687. See also R. 415, 416, 419, 426, 427.

Lubben simply refused to answer questions on cross-examination, his answers were utterly unresponsive, and he constantly interjected prejudicial comment which had no connection with the questions he was answering.[29]

The Judge did not bring this witness into line, although so requested.[30] This too was highly prejudicial and requires reversal.[31]

The prosecutor invaded Lawn's constitutional privilege when, without any possible excuse, he dramatically informed the jury that defendants had not produced the partnership books. "Mr. Wessel: I would like to see the Tavern and Eatsum books" (R. 2409). Motion for a mistrial was denied without any corrective action (R. 2410). This ruling was pejudicial error.[32]

A conviction secured by the illegal means used in this case must be reversed.

435, 438, 458-9, 571-3, 574-5, 576, 578, 580-1, 586, 630, 673, 872, 880, 885. "Mr. Wessel: I believe the answer is called for by the antagonistic comments and the attitude counsel is assuming with the witness" (R. 467). The answer referred to by the prosecutor was utterly unresponsive and highly damaging.

[29] R. 415, 425, 429, 432, 435, 463, 467, 478, 480, 481, 513, 539-40, 544, 571-3, 574, 575-6, 578, 580-1, 659, 665, 673, 675, 686, 863, 867, 868, 869-70, 871, 872, 873, 874, 877, 878, 881, 882-3, 885, 886, 888, 890, 893-4.

[30] R. 415, 429, 432, 481, 564, 571-3, 580-1, 665, 675, 687, 880, 883, 894.

[31] *Nalls* v. *U. S.*, 240 F. 2d 707, 711 (5 Cir. 1957); *Brown* v. *U. S.*, 202 F. 2d 474, 476 (5 Cir. 1953). Even if the prosecutor did not cue or encourage Lubben's unresponsive and prejudicial interjections, reversal is mandated. *Nalls* v. *U. S.*; *Brown* v. *U. S.*, cit. *supra*. "True, there is nothing to indicate and no reason to believe that the government intended or expected the witness to answer as he did. At the same time, we are not able to discern how innocence on the part of government counsel mitigates the damaging effect which the statement was calculated to have on the minds of the jury and the rights of the defendant." *U. S.* v. *Meagley*, 239 F. 2d 637 (7 Cir. 1957) at p. 638.

[32] *McKnight* v. *U. S.*, 115 Fed. 972 (6 Cir. 1902); *People* v. *Minkowitz*, 220 N. Y. 399 (1917).

The reasons are threefold. First, because the defendant has been found guilty on the basis of "evidence" which was not properly before the court and which could not but have affected the judgment of the jury. Second, because reversal of the conviction is the only real sanction against continued conduct of the same kind by federal officials. Third, because the federal courts can not lend themselves to participation in such unbecoming conduct. As Mr. Justice Traynor wrote in the opinion in which the California Supreme Court adopted the rule of exclusion with regard to evidence obtained by unreasonable search and seizure:

> "It is morally incongruous for the state to flout constitutional rights and at the same time demand that the citizens observe the law. The end that the state seeks may be a laudable one, but it no more justifies unlawful acts than a laudable end justifies unlawful acts by any member of the public. Moreover, any process of law that sanctions the imposition of penalties upon an individual through the use of fruits of official lawlessness tends to the destruction of the whole system of restraints on the exercise of the public force that are inherent in the 'concept of ordered liberty.' (See Allen, The Wolf Case, 45 Ill. L. Rev. 1, 20.)" *People* v. *Cahan*, 44 Cal. 2d 434, 446 (1955).

Or, as put by the House of Lords:

> "If in any case the evidence against a prisoner (other than that which is inadmissible) is very strong and is abundant to justify a jury in convicting, it may well seem unfortunate that a guilty man should go free because some rule of evidence has been infringed by the prosecutor. But it must be remembered that the whole policy of English criminal law has been to see that as against the prisoner every rule in his favour is observed and that no rule is broken so as to prejudice the chance of the jury fairly trying the true issues. The sanction for the observance of the rules of evidence in criminal cases is that, if they are broken in any case, the conviction may be quashed." *Maxwell* v. *Director*, 24 Cr. App. Rep. 152, 176 (1934).

This plain and egregious error requires reversal irrespective of trial objection. Time and again, this Court has reversed for plain error though no objection was made by counsel.

> "* * * [A] trial in court is never, as respondents in their brief argue this one was, 'purely a private controversy . . . of no importance to the public.' The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice * * *. Where such paramount considerations are involved, the failure of counsel to particularize an exception will not preclude this court from correcting the error. * * *" *New York Central R.R. v. Johnson*, 279 U. S. 310, 318-19 (1929).

How much more demanding than the *Johnson* case is this case which involves not merely a contest over money between private individuals but one between the United States and its citizens with the liberty of the defendants at stake. As this Court said in *United States* v. *Atkinson*, 297 U. S. 157, 160 (1936):

> "In exceptional cases, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings."

Misconduct of prosecuting attorneys, as at bar, has been recognized as seriously affecting the fairness, integrity and reputation of judicial proceedings calling for reversal regardless of objection.[33]

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[33] See, e.g., *Pierce* v. *U. S.*, 86 F. 2d 949 (6 Cir. 1936); *Benham* v. *U. S.*, 215 F. 2d 472 (5 Cir. 1954); *Snipes* v. *U. S.*, 230 F. 2d 165 (6 Cir. 1956); cf. *Robinson* v. *Pennsylvania R.R.*, 214 F. 2d 798 (3 Cir. 1954).

Once the prejudicial remarks of counsel had been made, once he had "vouched" for the truth of his witnesses' testimony, there was no cure available to the trial court. "In spite of the very clear admonition which the trial judge gave the jury we think that these remarks are not the kind that jurors could 'put out of their minds' simply by being told to do so. There must, therefore, be a reversal."[34]

Where, as here, the prosecution case against Lawn "may properly be characterized as weak—depending, as it did, upon the testimony of [Lubben] [Roth], an accomplice with a long criminal record" (295 U. S. at 89), this Court cannot properly affirm a conviction where the prosecutor has abused his office so grossly. Certainly this Court cannot say that the jury would have respected Lubben's and Roth's testimony without the support afforded by the "voucher" of the prosecutor and the "District Attorney's office", his reference to "other crimes" of the defendants, and his gratuitous presentation of non-record "evidence" in his summation. And, certainly, the Court cannot sanction this conduct in light of the prosecutor's certification that he was not making use of evidence which he had been forbidden to use by two United States District judges, when in fact he had done so.

To countenance such oppressive practices as at bar, even at their mildest form, is to open the door to wholesale decay of the constitutional rights of citizens, for such decay usually commences by "silent approaches and slight deviations from legal modes of procedure."[35]

It may be that the lapse of 22 years since this Court decided *Berger* has dulled memories of the standards of federal prose-

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[34] *U. S. v. Georga*, 210 F. 2d 49, 57 (3 Cir. 1954); *cf. U. S. v. Lotz*, 177 F. 2d 827, 829-30 (7 Cir. 1949); *Brown v. Walter*, 62 F. 2d 793 (2 Cir. 1933).

[35] *Boyd v. U. S.*, 116 U. S. 616, 635 (1886).

cution mandated thereby. Current prosecutors as officers of the United States and members of the Bar are bound to know and apply the wholesome doctrine of *Berger*.[36]

III.

PETITIONER WAS DENIED DUE PROCESS BY THE REFUSAL OF A HEARING ON THE USES OF ILLEGAL EVIDENCE AND LEADS AND CLUES THEREFROM.

On the ground of lack of foundation, the Trial Judge denied to petitioner a hearing or the right to cross-examine Government witnesses on the uses made by the prosecutor on the trial of evidence unconstitutionally and illegally obtained (e.g., R. 1354-6, 1943-5, 2076-88, 2136). This is further ground for reversal of petitioner's conviction.

These rulings were denial of due process because the record incontrovertibly showed that tainted evidence was used by the prosecutor to convict Lawn.

The foundation for the requested hearing was properly laid.

The necessary foundation for the requested hearing was adequately established by the proof in the record of the use on the trial of the product of unconstitutional or illegal conduct.[37]

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[36] The Government has intimated that all bars are down for prosecutors when a defendant's attorney strikes hard at Government witnesses who are admittedly perjurers and criminals. The record was plain that Roth and Lubben were perjurers and criminals; defendants' counsel simply recited the record when he called them such in his summation. A statement of record proof by Lawn's counsel does not provide an opportunity for the prosecutor to make himself an unsworn witness and to bridge the gaps in his proof by personal vouchers.

[37] *Nardone* v. *U. S.*, 308 U. S. 338 (1939).

Admittedly, the prosecutor had proceeded illegally[38] and the adjudication thereof was "the law of this case" by which "the Government is bound"; Judge Goddard's finding of illegal procedure "is binding on the Court, on the Government and everybody else at this time," said the prosecutor (R. 149, 168, 171, 1348-9).

Grand Jury Exhibits 2 and 4, dated July 15, 1952, and all other partnership and personal records obtained from Lawn and his co-defendants by the 1952 Grand Jury, were fruits of the adjudicated illegality and their use by the prosecutor accordingly proscribed.[39]

The prosecutor used illegal evidence and its leads and clues.

1. Grand Jury Exhibits 2 and 4 were introduced in evidence (Trial Exhibits 61A and 61B) by the prosecutor (R. 1021, 2998-3001).

Exhibits 61A and 61B were used as leads and clues to a large amount of oral testimony (R. 1018-21, 1074-5).

2. On the trial, Mr. Present, a Government agent, admitted that he had examined and audited various of the tainted books and records, prior to the return thereof to the defendants (R. 1943-4). Lawn was not permitted by the Judge to cross-examine Mr. Present as to uses made on the trial of the leads and clues derived by Mr. Present from those tainted books, although the prosecutor was willing that Lawn should cross-examine Mr. Present (R. 1943-5).

3. It also appears that the prosecutor used leads and clues on the trial derived from testimony elicited from Lawn and his co-defendants by the Kefauver Committee. The prosecutor so conceded in his brief to the Court of Appeals.

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[38] *U. S. v. Lawn*, 115 F. Supp. 674 (S. D. N. Y. 1953), app. dism. *U. S. v. Roth*, 208 F. 2d 467 (2 Cir. 1953).

[39] *Ibid.*, ftn. 38.

When charged in the Court of Appeals with proving Count 7 by use of unconstitutional leads and clues, the prosecutor claimed (Br. 64) that his source was "the Kefauver Senate Crime Investigating Committee which got all its leads from treasury agents." However, leads and clues from the Kefauver Committee were also proscribed.[40]

Denial of the requested hearings was constitutional error.

The Trial Judge was bound on the record in this case to grant the requested hearing.

In *Nardone* v. *U. S.*,[41] this Court ruled:

> "The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that wire-tapping [constitutionally tainted evidence in the case at bar] was unlawfully employed. Once that is established—as was plainly done here—the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree." (p. 341)

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[40] 52 Stat. 943 (1938), 18 U. S. C. § 3486, which was applicable in 1950 when the defendants testified before the Kefauver Committee, provided: "No testimony given by a witness before either House, or before any committee of either House, * * * shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony." The amendment of this section in 1954 to make it an immunity statute did not free the prosecutor to use the Kefauver testimony on the trial in 1955. *Adams* v. *Maryland*, 347 U. S. 179 (1954): "Congress left the Act on the books, and it was there when this petitioner testified" (p. 184). The Government in *U. S.* v. *Olson*, 134 F. Supp. 481, 482-3 (E. D. N. Y. 1955), conceded, after the statute was amended in 1954, that testimony given before the King Committee could neither be used before the Grand Jury to indict nor the trial jury to convict (p. 483). Neither the testimony itself nor leads nor clues therefrom could legally be used by the prosecutor. *Nardone* v. *U. S.*, 308 U. S. 338 (1939).

[41] 308 U. S. 338 (1939).

This Court has uniformly held that the denial of a properly requested hearing is fundamental error.[42]

In *U. S. v. Coplon*,[43] Judge Learned Hand held (p. 638):

> "* * * In the case at bar it may seem to have been a flimsy grievance to deny to Judith Coplon the opportunity to argue that these records did 'lead,' or might have 'led,' to her conviction; in truth it is extremely unlikely that she suffered the slightest handicap from the judge's refusal. But we cannot dispense with constitutional privileges because in a specific instance they may not in fact serve to protect any valid interest of their possessor. Back of this particular privilege lies a long chapter in the history of Anglo-American institutions. Few weapons in the arsenal of freedom are more useful than the power to compel a government to disclose the evidence on which it seeks to forfeit the liberty of its citizens."

The Government may suggest that it was unaware that it had transgressed and that defense counsel did not alert the Judge to the error. However, the consequences of such error fall only on the offending party; whether the error derives from inadvertence or bad faith is immaterial.[44]

It was constitutional error to sustain the prosecutor's affidavits.

Lawn was foreclosed on his application for a hearing, on affidavits of the prosecutor and his associates.

It was fundamental error to sustain the conclusiveness of such affidavits.[45] Like affidavits were found contrary to

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[42] *Gouled* v. *U. S.*, 255 U. S. 298 (1921); *Nardone* v. *U. S.*, 308 U. S. 338.

[43] 185 F. 2d 629 (2 Cir. 1950).

[44] *U. S.* v. *Meagley*, 239 F. 2d 637 (7 Cir. 1957); cf. *Petition of Provoo*, 17 F. R. D. 183, 202 (D. Md.), aff'd 350 U. S. 857 (1955).

[45] *Herman* v. *Claudy*, 350 U. S. 116 (1956); *U. S. ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260 (1954); *U. S.* v. *Lipschitz*, 117 F. Supp. 466 (E. D. N. Y. 1954); *Buono* v. *U. S.*, 126 F. Supp. 644 (S. D. N. Y. 1955).

fact when the 1952 indictments were dismissed by Judge Goddard; and Trial Exhibits 61A and 61B make it plain of record that the trial affidavits were not factually correct either.

As this Court pointed out in *Chessman* v. *Teets*,[18] at p. :

> "Evidently it also needs to be repeated that the overriding responsibility of this Court is to the Constitution of the United States, no matter how late it may be that a violation of the Constitution is found to exist. * * * We must be deaf to all suggestions that a valid appeal to the Constitution, even by a guilty man, comes too late, because courts, including this Court, were not earlier able to enforce what the Constitution demands. The proponent before the Court is not the petitioner but the Constitution of the United States."

IV.

THE DISMISSAL OF THE INDICTMENT AS TO ABC MANDATED ACQUITTAL OF PETITIONER ON COUNT 9.

Lawn was charged in Count 9 with aiding and abetting the American Brands Corporation (ABC) to evade payment of its taxes for the tax year 1946 (R. 15-16).

It is plain that only ABC could evade the payment of its taxes, that only ABC owed a duty to pay its taxes, and that Lawn was under no duty to compel ABC to pay or to pay on behalf of ABC its taxes.

ABC was not charged as a defendant in Count 9.

However, ABC was charged as a defendant in Count 10 (R. 16). In Count 10 ABC was charged with, *inter alia*, conspiring to evade the payment of the very taxes involved in Count 9 (R. 16-17).

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[18] 353 U. S. — (1957).

The charging language of Count 10 was identical with the charging language of Count 9 (cf. Count 9 with paragraphs 1, 2, 6 and 7 of Count 10). In short, ABC was charged in Count 10 with all of the elements necessary to make up the substantive crime charged in Count 9 (R. 16-17).

Accordingly, Count 10 encompassed Count 9 and a conviction of, acquittal of, or dismissal as to, ABC on Count 10 is equivalent in law to a conviction, acquittal, or dismissal as to Count 9. Necessarily implicit in each of such events is a determination of guilt or innocence, as the case may be, of the act which petitioner is charged with having aided.

In *U. S. v. Zeuli*,[47] the Court (per L. Hand, C.J.) held (p. 847):

> "• • • the conspiracy count itself—if one includes the fourth overt act—alleged all the facts which made up the substantive crime. As mere matter of pleading, the characterization of the criminal liability arising from those facts is of no importance, provided the accused is advised of what he has to meet • • •."

The indictment as to ABC was dismissed (R. 2747). The dismissal of Count 10 as to ABC is in law, under the foregoing authority, equivalent to a dismissal of Count 9 as to ABC; it establishes as a fact adjudicated that ABC did not commit the crime of evading the payment of its own taxes.[48] As matter of law, petitioner could not therefore have aided ABC to commit this crime and Count 9 should have been dismissed.[49]

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[47] 137 F. 2d 845 (3 Cir. 1943).

[48] *Yawn* v. *U. S.*, 244 F. 2d 235 (5 Cir. 1957).

[49] *Legatos* v. *U. S.*, 222 F. 2d 678, 688 (9 Cir. 1955); *U. S. v. Titus*, 210 F. 2d 210, 214-5 (2 Cir. 1954); *U. S. v. Klock*, 210 F. 2d 217, 220 (2 Cir. 1954); *Morgan* v. *U. S.*, 159 F. 2d 85, 87 (10 Cir. 1947); see *Farrell* v. *U. S.*, 181 F. 2d 981, 985 (9 Cir.), cert. den. 340 U. S. 891 (1950); *Beauchamp* v. *U. S.*, 154 F. 2d 413, 416 (6 Cir. 1946).

V.

PETITIONER WAS ENTITLED TO ACQUITTAL ON ALL COUNTS. THE GOVERNMENT'S THEORY OF PLEADING AND PROOF DID NOT CHARGE OR ESTABLISH A CRIME UNDER I.R.C., § 145(b).

Petitioner was charged with aiding others to violate the I.R.C. of 1939, § 145(b) (Counts 7 and 9) (R. 15-6). Lawn was not charged as an offending taxpayer.

The theory of the charge, even if established (which it was not), does not spell out a felony under I.R.C., § 145(b).

The opposing contentions.

The Government's theory of pleading and proof against the petitioner was that the taxpayers had concealed their means to pay their taxes or had misused their capital so they could not pay taxes, and these were criminal acts. The Government stipulated that so far as concerns its case against petitioner, the taxpayers had properly disclosed and reported their sources of income and tax debts due to the United States (R. 2715-8).

The petitioner contends that absent a tax deficiency, the taxpayer's non-payment of a tax debt, properly reported and disclosed, is not a felony, irrespective of whether the taxpayer conceals or loses or diverts his assets elsewhere than to payment of his fully and properly admitted debt.

The felony statute strikes at tax deficiency not uncollectibility of debts.

It is plain beyond doubt that non-collection and not deficiency in tax is the legal charge in this case.

The basis of the conviction.

The Court charged the jury:

> "Here [Count 7], however, the Government says i[t] is not charging him [Gigno] with falsely reportin[g]

taxes. It says, taking their taxes as reported, they evaded payment of those taxes by concealing assets, to make it impossible to collect those taxes." (R. 2715)

"Again [Count 9] the same statute is involved, and the same general question is involved: the evasion of the payment of a tax due from the American Brands Corporation, not by filing a false return, but taking the return as filed as correct by concealing, diverting the assets of that corporation so that the tax could not be collected." (R. 2717)

The prosecutor similarly explained to the jury the theory of Counts 7 and 9:

"What happened to that $286,000 that he [Giglio] said he owed. Count 7 shows that he paid peanuts for that. He paid his estimated taxes in advance, about $8,000, but of the $286,000 that he said he owed, he paid nothing, except for that estimated amount of about $8,000, and when the Government, when he knew the Government was coming around, he hid his assets, concealed them, got rid of everything he had so nobody would find it." (R. 2895)

"The second kind is where you say you earned money, but you decide, 'I am just not going to pay the Government. Why should I pay them? I can use the money myself'." (R. 2895)

The pertinent provisions of the statute.

I.R.C. of 1939, § 145(b) provides in part pertinent:

"* * * any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall * * * be guilty of a felony * * *."

The case law.

No case of which we are aware has sustained a conviction under I.R.C. § 145(b) on the Government's theory submitted to the jury. The Government's construction of the statute would render its constitutionality extremely doubtful, and

no intent that it be so construed was manifest from any congressional act.

The cases uniformly hold that where taxpayers properly and truthfully disclose their sources of taxable income and properly report their tax liability, i.e., where no tax deficiency is proved, there is no felony under § 145(b).

In *Spies* v. *United States*,[50] the taxpayer had failed either to file a tax return or pay the tax even though he was by law required to do so. In construing I.R.C. of 1939, § 145(b), this Court said (p. 498):

> "But in view of our traditional aversion to imprisonment for debt, we would not without the clearest manifestation of congressional intent assume that mere knowing and intentional default in payment of a tax, *where there had been no willful failure to disclose the liability*, is intended to constitute a *criminal offense of any degree*." (Emphasis added.)

In view of the highly questionable constitutionality of basing crime on intentional default in payment absent a tax deficiency, it is not to be presumed that the Congress intended that intentional default in payment, however consummated, is criminal.[51]

This Court in *Spies* did state that proscribed felony conduct includes "concealment of assets or covering up sources of income" (at p. 499).

However, these words were included in a series of examples of felony conduct—all of which expressed methods of preventing and impeding the determination of the true tax due and none of which had any reference to conduct designed to thwart collection of the true tax reported. We read *Spies* to mean that this Court has ruled that wilful failure to disclose the liability is the conduct which the statute aims at

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[50] 317 U. S. 492 (1943).

[51] See *Pollock* v. *Williams*, 322 U. S. 4 (1944); *Yates* v. *U. S.*, 353 U. S. — (1957).

and a tax deficiency in this sense must be alleged and proved.[32]

There are no cases supporting the prosecution's contention and the Court's charge. All the authority both under I.R.C. 145(b) and similarly worded sections of the Internal Revenue Code is to the contrary.[33]

In the *Clay* case, 218 F. 2d 483, the Court in dismissing an indictment like this one under § 145(b), pointed out that although the evidence showed that there was liability for and wilful failure to pay the taxes, guilt could be posited only on a tax deficiency. The Court stated appositely:

> "The record evidences an attempt by appellee to test its theory that it can 'make out a felony violation * * * in a "failure to pay" situation.' The government *concedes, as it must*, that allegation and proof of liability for the occupational tax, coupled with a failure to pay it, is not sufficient to constitute a felony violation, but, in addition, there must be some affirmative act on the part of the defendant showing an attempt to evade the imposition of the tax." (Emphasis added.)

The Government has relied herein on *U. S. v. Forcio*, 224 F. 2d 255 (7 Cir. 1955) cert. den. 350 U. S. 883 (1956), as some support for its theory in the case at bar. This reliance is misplaced.

Bardin was a case involving a tax deficiency; the prosecution was based on the net worth theory. The net income reported by Bardin on his return for the tax year in question was $528,824.56. The proof showed that his net income for

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[32] Thus, in Gilman, *Current Problems in Criminal Tax Fraud*, 33 Taxes 749, 752 (1955), the principle is stated as follows: "* * * under the law as it is now, a deficiency must be proved in order to sustain the felony conviction under Section 7201." § 7201 of the 1954 Code is the successor to § 145(b) of the 1939 Code under which Lawn was prosecuted.

[33] *Clay* v. *U. S.*, 239 F. 2d 196 (5 Cir. 1956); *Clay* v. *U. S.*, 218 F. 2d 483 (5 Cir. 1955) (I.R.C. § 2707(c) (1939)); *Jones* v. *U. S.*, 164 F. 2d 398 (5 Cir. 1947) (I.R.C. § 145(b)); cf. *Moody* v. *U. S.*, 207 F. 2d 998 (5 Cir. 1953), cert. den. 347 U. S. 933 (1954).

that year was actually $758,713.94 and the indictment alleged that the tax owing was $639,841.28, more or less, or approximately $111,000 more than the net income Bardin reported. In short, Bardin had failed to disclose his true tax liability and the Government established a tax deficiency.

At bar, to the contrary, the indictment alleged that the taxes due were as reported. The theory of the instant prosecution and the Judge's charge as shown above, were that the net income and taxes due of the taxpayers were properly reported and disclosed. Accordingly, one essential element of pleading and proof of crime — failure to disclose the true tax liability — is missing.

The Government's attempt to ground crime on concealment fails for another reason. Count 9 does not charge concealment of the taxpayers' assets. Count 9 simply charges that the defendants converted the taxpayers' money for their own use. The proof as to Count 7 shows only that Giglio dissipated his means of payment. This is neither concealment nor crime.[54]

It cannot be said that the indictment pleads or the proof shows a case which is plainly and unmistakably within the statute. "Before a man can be punished, his case must be plainly and unmistakably within the statute."[55]

Since Counts 7 and 9 are legally insufficient, Count 10 must fall because there was no showing or pleading of any attempt on the part of Lawn to aid any taxpayer to evade the reporting of his true tax liability. Count 10 fails because the claim of Lawn's connection with the alleged conspiracy is limited solely to the phases thereof covered by Counts 7 and 9.[56]

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[54] *U. S. v. Schireson*, 116 F. 2d 881, 883-4 (3 Cir. 1940); *U. S. v. Camp*, 140 F. Supp. 98, 100 (D. Haw. 1956); *U. S. v. Alper*, 156 F. 2d 222, 224 (2 Cir. 1946); *Levinson v. U. S.*, 47 F. 2d 451 (6 Cir. 1931).

[55] *U. S. v. Brewer*, 139 U. S. 278, 288 (1891).

[56] *Cleaver v. U. S.*, 238 F. 2d 766, 770 (10 Cir. 1956); *Ellis v. U. S.*, 138 F. 2d 612, 622 (8 Cir. 1943).

VI.

PETITIONER WAS ENTITLED TO ACQUITTAL ON ALL COUNTS. THE INDICTMENT WAS NOT PROVED PRIMA FACIE.

The record is barren of requisite proof needed for a *prima facie* case against petitioner. The paucity of the allusions to petitioner in the record is in striking contrast with its bulky size.

As an aid to this Court, we have set forth *infra* p. 80 on one page, in Schedule form, a citation to every single reference in the record, directly or by implication, to petitioner Lawn. Analysis thereof conclusively demonstrates that:

There is no proof whatever of guilty knowledge, criminal intent or purposive entry into any criminal venture on the part of this petitioner.

There is no proof that petitioner joined in conspiracy; nor that any contribution essential to its success came from him; nor that he had any purposive attitude towards it; nor that he had any stake in its success; nor that he obtained any fruits of conspiracy; nor that he knowingly associated in any unlawful common enterprise; nor that he had any knowledge that he was helping to carry forward any crime or phase of conspiracy; nor that petitioner ever agreed with anyone to advance an improper joint interest.

The hypotheses as to petitioner's guilt advanced by the Government heretofore and by the Court below break into eight categories.

(1) Lawn is said to have had the requisite guilty knowledge because he was "legally astute" and the transactions "proliferated around him." The Solicitor General has heretofore said merely that Lawn had knowledge of the "legal, financial and tax problems of the enterprises."

(2) Lawn is said to have participated in much of the planning of the conspiracy. The Solicitor General has heretofore argued only that Lawn was present at the planning.

(3) Lawn is said to have formed the "American" Corporations for tax evasion purposes.

(4) Lawn is said to have been the taxpayer's legal adviser.

(5) Lawn is said to have participated in the New Jersey receivership for tax evasion purposes.

(6) Lawn is said to have been valuable to the conspiracy because of alleged government contacts.

(7) Lawn is said to have aided Giglio to conceal his assets.

(8) Lawn is said to have been paid for services in furtherance of conspiracy. The Solicitor General has heretofore argued merely that Lawn was paid for services.

Each of these hypotheses is factually unproved in the record or legally erroneous and is based on invalid, unauthorized and unconstitutional presumptions, assumptions and inferences.

The Government's testimony squarely contradicts each of these hypotheses. They depend on evidence having no probative effect as to Lawn and establishing no connection with the crimes charged. For example, the alleged supporting evidence relates to what others said about Lawn in his absence; to acts after the end of the conspiracy; to acts of others which antedated the formation of the conspiracy or the limitary period; to acts of others having reference to collateral black-marketeering or collateral frauds on creditors; to post-conspiracy acts of Lawn to head off prosecution.

The hypotheses invalidly equate mere presence with affirmative acts and they bottom guilt on Lawn's association with the others as a salaried employee.

We turn now to a detailed analysis of the evidence and of the Government's hypotheses.

No proof of requisite guilty knowledge.

Since the taxes allegedly evaded were not owed by Lawn, the Government was bound to prove that Lawn knew that the taxpayers (a) owed taxes, (b) did not pay them and (c) had no intention to pay them. No such proof was made.

The Judge so charged as to Counts 7 and 9 (R. 2716), and the Government was bound to prove these elements of the alleged crimes as the law of the case.[57]

The same element of guilty knowledge was an essential which the Government was required to prove on the conspiracy count, since such knowledge was an essential element of the substantive counts encompassed by the conspiracy count.[58] Proof of such knowledge was essential in order to prove both wilfulness (a statutory requirement) and criminal intent;[59] and a defendant may not be convicted of conspiracy unless he is proved to have knowledge of the conspiracy.[60]

Neither the Government nor the Court below has pointed to a single piece of evidence which even squints in the direction of proving the knowledge requisite for conviction of Lawn.[61]

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[57] *Pelz* v. *U. S.*, 54 F. 2d 1001, 1003 (2 Cir. 1932).

[58] *U. S.* v. *Ausmeier*, 152 F. 2d 349 (2 Cir. 1945); *Fulbright* v. *U. S.*, 91 F. 2d 210, 211 (8 Cir. 1937).

[59] *U. S.* v. *Pechenik*, 236 F. 2d 844 (3 Cir. 1956); *Forster* v. *U. S.*, 237 F. 2d 617 (9 Cir. 1956); *Legatos* v. *U. S.*, 222 F. 2d 678, 688 (9 Cir. 1955); *Harding* v. *U. S.*, 179 F. 2d 419, 422 (6 Cir. 1950).

[60] *U. S.* v. *Falcone*, 311 U. S. 205, 210-11 (1940).

[61] The Solicitor General in his brief opposing certiorari contended that Lawn knew "the legal, financial, and tax problems of the enterprises" (citing R. 883, 989, 1096, 1122-3, 1135, 1144-5, 1178-6, 2154-5).

It is to be noted that the Solicitor General did not claim that Lawn knew that the taxpayers owed taxes, and did not pay them, and did

The prosecutor's thesis was his opinion that only Lawn was smart enough to work out the alleged tax evasion schemes (R. 2596-7 2631); and that it should be assumed or presumed therefore that Lawn had the requisite knowledge (*e.g.*, R. 1365).

The Court below held that the requisite but unproved guilty knowledge should be presumed because Lawn was of "admitted legal astuteness." The Court below noted that because the transactions "proliferated around" Lawn it would be "wholly amazing" to credit Lawn with lack of knowledge (R. 2968).

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not intend to pay them. That is the requisite knowledge which the Government must prove, not knowledge of legal, financial and tax problems.

Moreover, the record references cited do not support the Solicitor General's thesis.

The cited record references disclose: Lawn was to buy corn (R. 883); Lawn brought in Portner and Rabkin, reputable tax experts, whom Lawn knew, to advise Roth on tax matters; at Lawn's request Roth prepared a truthful statement which Roth handed to Portner and Rabkin (R. 998-90), so that they could give proper tax advice, which they did (R. 1006). Roth prepared a statement for Dun and Bradstreet at Lawn's request (R. 1122-3). Giglio told Roth, in Lawn's absence, that the minute books were in Lawn's office (R. 1135). Lawn co-signed Ex. 90, an application for extension of time for payment of taxes by corporations expecting carrybacks (on September 19, 1947, after the conspiracy and crimes were completed) which application was prepared by Roth (R. 1144-5) and was accurate when made since there were losses to be carried back (R. 2229). Lawn was present when the New Jersey receivership was discussed and retained Kohn, an attorney, to represent the corporations in receivership. This happened in 1948 (R. 1175-6; 2154-5).

There is not a word about Lawn's guilty knowledge in any of these cited references. They do not show that Lawn had knowledge of the "legal, financial and tax problems of the enterprises."

The Solicitor General's references to pages R. 2154-5 are unwarranted for another reason. The Government rested at page R. 2073; Lawn rested at the close of the Government's case without testifying or offering any evidence at page R. 2116. Hence, the evidence relied on now by the Government and admitted after page R. 2116 cannot be used to sustain Lawn's conviction. *U. S. v. Postma*, 242 F. 2d 488 (2 Cir.), cert. den. 353 U. S. — (1957); cf. *U. S. v. Calderone*, 348 U. S. 160, rev. (1954).

To refuse to credit Lawn with lack of knowledge does not satisfy the requirement of proof of knowledge. The constitutional presumption of innocence does not yield to the conjecture that absence of guilty knowledge would be wholly amazing, nor can guilty knowledge be inferred from legal astuteness.

This Court has appositely held: "Such incriminating presumptions are not to be improvised by the judiciary."[62]

Nor could the Court below infer guilty knowledge from legal astuteness, since plainly legal astuteness has no relevance to guilt.[63]

Lawn did not testify. Constitutionally, the Government was bound to give proof of the essentials of the crime charged to Lawn. Mere speculative disbelief that Lawn could honestly claim lack of knowledge "does not supply proof that the defendant participated in, directed or knew" the essential facts.[64] But further than this, Lawn's "legal astuteness" is itself an inference. There is no direct proof that Lawn was legally astute—indeed when the occasion seemed suitable, the prosecutor classified Lawn as only a mediocre law student (R. 250).

The plain gap in the proof was bridged by the Court below by drawing an inference of guilty knowledge from an inference of legal astuteness. This reasoning is impermissible as piling inference on inference.[65]

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[62] *Morissette* v. *U. S.*, 342 U. S. 246, 275 (1952). Not even the Congress may improvise such damning presumptions and assumptions. p. 275 of 342 U. S.

[63] Due process makes it impermissible "thus to shift the burden by arbitrarily making one fact [legal astuteness], which has no relevance to guilt of the offense, the occasion of casting on the defendant the obligation of exculpation." *Tot* v. *U. S.*, 319 U. S. 463, 469 (1943); *Morissette* v. *U. S.*, cit. *supra*, n. 62 at p. 275.

[64] *U. S.* v. *Pechenik*, 236 F. 2d 844, 847 (3 Cir. 1956). Conjecture or suspicion that Lawn had guilty knowledge is likewise no substitute for proof. *Thomas* v. *U. S.*, 239 F. 2d 7, 10 (10 Cir. 1956).

[65] *Johnson* v. *U. S.*, 192 F. 2d 673 (8 Cir. 1951); *Watson* v. *U. S.*

The factual record in this case precludes and contradicts the invalid and unconstitutional inferences and presumptions utilized by the Court below.

Time and time again the prosecutor sought to elicit testimony from the Government witnesses that Lawn was present at a meeting where he could have, or had otherwise, acquired guilty knowledge. Each time the Government's own witness unequivocally exculpated Lawn.[66]

Although Roth "knew exactly what happened" (R. 1285), Roth removed Lawn from culpability and identified persons other than Lawn with all phases of the alleged tax crimes.

Thus Roth testified: It was he, Roth, who set up the cash box (R. 1026); it was Roth who handled the books (R. 1076); it was Ronayne who handled the taxes (R. 999, 1076); it was Ronayne's duty to take care of the tax returns (R. 1031); it was Rabkin who was consulted on taxes (R. 1066); and it was Giglio who made the final decisions (R. 1076) and Lawn was not present when the make up of the tax returns as filed was discussed (R. 1031).

Lawn's duties were to handle research and export-import affairs (R. 1023), and the proof showed that *it was research, not taxes*, that Lawn discussed with Roth (R. 1070).

In *U. S. v. Pechenik*,[67] the Court appositely held:

> "It is suggested by the government that it is incredible that the defendant did not know all along that capital expenditures were improperly treated; hence he knew the corporation's tax returns were false. This suggestion, however, does not arise from the evidence, but rather from unwillingness to believe that the evidence is true. * * *. But disbelief does not supply proof that the defendant participated in, directed or knew the books were kept incorrectly."

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[66] See, *e.g.*, R. 352, 358, 397, 998, 999, 1004, 1005, 1008, 1009, 1024, 1026, 1028, 1031, 1036, 1038, 1069, 1072, 1076, 1092, 1095, 1099, 1112-3, 1114, 1119, 1120-1, 1123, 1125, 1134, 1135, 1136, 1141, 1148, 1149, 1181.

This Court has time and again held that want of proof cannot be supplied by rejecting record evidence.[88]

No proof that Lawn planned, joined or participated in crime.

There is absolutely no evidence that Lawn participated in the planning of or the commission of any tax evasion scheme, or that Lawn intended or agreed to cooperate in the commission of any alleged crime.

Count 10 charges a conspiracy to evade taxes due from Giglio, Livorsi, Roth, five corporations surnamed "American," and two partnerships, *viz.*, Eatsum Food Products Ltd. and Tavern Fruit Juice Company.

This conspiracy encompasses the substantive charges set forth in the other nine counts. We show, *infra*, that Lawn had no connection with the matters charged in counts 7 and 9.

The crimes alleged in counts 1, 2, 3, 4, 5, 6 and 8 were, according to the Government, completed. The Government did not charge Lawn with aiding, abetting or in any manner being an accessory or connected with those seven crimes, and there is no proof of any connection of Lawn to those crimes. This is cogent evidence that Lawn had no part in any conspiracy to commit those crimes.

Since Lawn is not shown to have any connection with any of the substantive counts which comprise the entire conspiracy, the conspiracy count must be dismissed.[89]

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[88] *Moore* v. *Chesapeake & Ohio Railway Co.*, 340 U. S. 573, 576 (1951); *Bunt* v. *Sierra Butte Gold Min. Co.*, 138 U. S. 483, 485 (1891).

[89] *Cleaver* v. *U. S.*, 238 F. 2d 766, 770 (10 Cir. 1956); *Filo* v. *U. S.*, 138 F. 2d 612, 622 (8 Cir. 1943).

The language of *Yates* v. *U. S.*[70] is equally *apropos* as to Lawn:

> "So far as this record shows, none of them has engaged in or been associated with any but what appear to have been wholly lawful activities or has ever made a single remark or been present when someone else made a remark, which would tend to prove the charges against them."

Nevertheless, for purposes of completeness we outline the evidence irrespective of its probative effect or admissibility as against Lawn.

The indictment was obtained on July 23, 1953. The applicable statute of limitation is six years.[71]

For purposes of limning the applicable law we relate the alleged crimes and conspiracy in its three phases:

1.—The stale and barred act phase, covering the period prior to July 23, 1947.

2.—The phase between that date and the end of the conspiracy—July 23, 1947 to mid-September 1947.

3.—The post-termination phase—that period subsequent to mid-September 1947.

The totality of evidence covering all three phases of the alleged crimes is absolutely barren of any circumstances or direct proof of an agreement on the part of Lawn to participate in any tax evasion. One of the alleged conspirators (Roth, who "knew exactly what happened") (R. 1285) testified for the Government. At no time did Roth testify that Lawn was a party to any such agreement. The only possible explanation for the voluble Roth's silence on the subject is that Lawn was not a party to any such agreement. Without such participation Lawn was entitled to acquittal.[72]

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[70] 355 U. S. —, (1957).

[71] I.R.C. § 6531 (1954).

[72] *U. S.* v. *Falcone*, 311 U. S. 205 (1940).

We turn to a discussion of each of the aforesaid three phases of the alleged conspiracy and crimes:

a. Lawn did not plan, join or participate in crime during the stale and barred act phase.

The evidence on this pre-July 23, 1947 phase, is:

Lawn was an employee of Tavern earning $250 to $350 a week salary for services rendered as the man in charge of research (R. 1023).

Lawn had no official connection with Eatsum (R. 329). His sole contacts were that he once negotiated a sale of some corn syrup or a purchase of corn from farmers (R. 1092); and Lawn once told Lubben that Lawn could have someone buy corn better, cheaper and faster (R. 333).

Lawn did not form corporations for tax evasion purposes.

Giglio told *Lubben*, in 1945, allegedly in Lawn's presence, that Giglio's profits were tremendous, that Giglio was not interested in paying a lot of taxes, and that something had to be done and done quickly. Giglio is supposed to further have told *Lubben* that Giglio would form a number of corporations, siphon off Eatsum's profits through "phony" invoices from the corporations to Eatsum and then dissolve the corporations in five or six months before the time arrived to pay taxes (R. 367-8).

Lawn said nothing and took no part in the conversation (R. 367-8). Roth, who was also allegedly present, denied that any such conversation took place in Lawn's presence (R. 1125).

As matter of law this statement was not evidence as against Lawn since on its face it antedated the formation of any conspiracy[7]—the statement speaks only of future events.

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[7] *Manner* v. *U. S.*, 57 F. 2d 506 (10 Cir. 1932); *Bartlett* v. *U. S.*, 166 F. 2d 920 (10 Cir. 1948); *Morrow* v. *U. S.*, 11 F. 2d 256 (8 Cir. 1926).

Moreover, this alleged scheme was never carried out. The various corporations formed were not dissolved, and indeed, it is these very corporations which are here charged with tax evasion. No "phony" invoices were in fact issued, and the profits of Eatsum were not siphoned off through corporations.

Of course, the mere fact that Lawn was present at such conversation does not make him a participant in any crime. Thus, in *Cleaver* v. *U. S.*,[74] the Court stated the universal rule (p. 771):

> "Webster, however, *did not participate* in the planning or the commission of the burglary, although *he was present* during a number of the conversations among the various conspirators. Mere knowledge, approval of or acquiescence in the object or the purpose of the conspiracy, *without an intention and agreement to cooperate* in the crime is insufficient to constitute one a conspirator." (Emphasis added.)

Whatever may have been the intent of Giglio, Lubbeck and Roth, as to evasion of taxes, that was not Lawn's intent. It was Lawn's intent to create a dynasty of sugar, candy and jelly (R. 1124-5).

Thus Roth unequivocally testified (R. 1124-5):

> "A. Mr. Lawn was instrumental in organizing these corporations in January, 1946, in anticipation that this process of substitute sugar would be effected, and we organized a corporation called American Candy Corporation, because the substitute of sugar is used in candy, American Sweets for maraschino cherries because sugar is used in that product. A trucking corporation, a finance corporation, American Brands Corporation, American Brands Wholesale Corporation, American Agar Corporation for research.
>
> At that time he [Lawn] said, 'The only time that I know that we will be successful is when the Depart-

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[74] 238 F. 2d 766 (10 Cir. 1956).

ment of Justice—when we have to defend ourselves against the Department of Justice on an antitrust lawsuit, and we are going to have a small dynasty within our organization'."

It is thus crystal clear that if Roth, Giglio and Lubben intended to form corporations for the purpose of dissolution and tax evasion, and that a conspiracy was formed to achieve that end, Lawn rejected that end and was working for a diametrically opposed result. Lawn thus had no part in any such crime, and he sought only to create a "dynasty" dealing in sugar, candy and jelly.

Lawn did not form the corporations; this was handled by Rossbach, a New Jersey attorney (R. 1115).

None of the pre-July 23, 1947 evidence was proof or admissible against Lawn. Such stale acts are admissible only to show that a defendant became a party to the conspiracy charged [75] and the continuation thereof.

The so-called proof does not relate to any agreement or intention on the part of Lawn to join in any crime or conspiracy and therefore as to Lawn such stale acts could not show a continuation thereof. Hence, they have no probative effect as to Lawn whatsoever.

b. Lawn did not plan, join or participate in crime during the July 23 to mid-September 1947 phase.

The record discloses that the only things that occurred in this phase of the case (other than Lawn drawing a salary and the Giglio house transaction, discussed *infra*), were the preparation and filing by Roth of the tax returns of the various taxpayers.

There is absolutely no proof or attempt to prove whatsoever that during this phase of the case Lawn joined in any

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[75] *Pinkerton* v. *U. S.*, 145 F. 2d 252, 254 (5 Cir. 1944); *U. S.* v. *Schneiderman*, 106 F. Supp. 892, 899 (S. D. Cal. 1952).

conspiracy or crime or agreed to or intended to participate therein.

Lawn was not legal or tax adviser to taxpayers.

The evidence is conclusive that Lawn had nothing to do with the accounting books, the preparation of the data for the tax returns, or the nonpayment of the taxes, or any matter legal or otherwise in connection with the returns or nonpayment of the taxes. This was all done by others (R. 999, 1006, 1026, 1031, 1076); and Roth, who made out the tax returns, subject to the supervision of Romayne and the final "okay" of Giglio, never discussed any of the tax problems or tax returns with Lawn (R. 998, 1004, 1024, 1026, 1038, 1119, 1121, 1125, 1134, 1135, 1182). Lawn was not present at the discussion when the tax returns were being filed (R. 1031).

Lawn did not act as counsel for any of the taxpayers. They retained others as attorneys for even the simplest transaction (R. 1005-6, 1076, 1115, 1223, 1470; 2168, 2230).

When Lawn learned that Roth had mistakenly included a corporation in which Lawn was interested, named Lawn International, in the consolidated tax return filed by the "American" corporations, Lawn demanded that Roth delete Lawn International therefrom (R. 1112-3), and Lawn International was stricken from the affiliation schedule (R. 1112-3). At that time American Agar, one of the "American" corporations in which Lawn was a stockholder, was not included in the affiliation schedule (R. 1113), and Roth did not discuss with Lawn the inclusion of Agar therein (R. 1134).

In short, the evidence is conclusive that Lawn did not join the conspiracy or crime during this phase of the case.[76]

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[76] *U. S. v. Liss*, 137 F. 2d 995 (2 Cir.), cert. den. 320 U. S. 775 (1943); *U. S. v. Carangella*, 198 F. 2d 3, 7 (7 Cir.), cert. den. 344 U. S. 881 (1952); *U. S. v. Ah Kee Eng*, 241 F. 2d 157 (2 Cir. 1957); *Butler v. U. S.*, 197 F. 2d 561 (10 Cir. 1952). "So far as the evidence discloses he merely stood by and watched the game with indifference." *Donovan v. U. S.*, 54 F. 2d 193, 194 (3 Cir. 1932).

c. Lawn did not plan, join or participate in crime during the post-termination phase.

The alleged conspiracy ended in mid-September 1947. The outcome of the alleged tax conspiracy was irrevocably fixed and determined when the tax returns were filed in mid-September 1947.

The alleged conspiracy was dissolved in mid-September 1947.

The alleged conspiracy seems to have two tentacles: A conspiracy to file false tax returns and a conspiracy to conceal assets so as to thwart the collection of taxes. It is obvious that the conspiracy to file false tax returns ended with the filing thereof (R. 2706, 2708, 2711, 2713, 2715), and the conspiracy to conceal necessarily ended also with the filing of the tax returns (R. 2716, 2718) and the prosecutor so conceded (R. 2890).

As matter of law the substantive crimes were completed with the filing of the alleged false returns and concealment, if at all, was then accomplished;[77] the tax was then due and hence the conspiracy too ended in mid-September 1947.[78]

The ends allegedly sought had, upon filing of the tax returns, been achieved, and the alleged conspiracy was then dissolved.[79]

There is no allegation of a continuing conspiracy to thwart prosecution. Accordingly, none of the post mid-September

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[77] *Gazick* v. *U. S.*, 54 F. 2d 618 (7 Cir.), cert. den. 285 U. S. 545 (1932); *U. S.* v. *Mathis*, 28 F. Supp. 582 (D. N. J. 1939).

[78] *Irvick* v. *U. S.*, 329 U. S. 211 (1946); *U. S.* v. *Maloney*, 200 F. 2d 344 (7 Cir. 1952).

[79] *Grunewald* v. *U. S.*, 353 U. S. 391 (1957); *Bollenbach* v. *U. S.*, 326 U. S. 607 (1946); *McDonald* v. *U. S.*, 89 F. 2d 128 (8 Cir.), cert. den. 301 U. S. 697 (1937).

1947 acts and statements of others are evidence against or admissible against Lawn.[80]

There is no evidence against Lawn during the post-termination phase.

There is not a single statement made or act done by Lawn in the post-termination period, or for that matter at any time, which indicates in any manner that Lawn either joined the conspiracy, participated in its planning or intended or agreed to cooperate in its execution. Nonetheless, we review the evidence for the purpose of completeness.

Lawn not involved in tax crimes charged through New Jersey Receivership.

Both testified that a scheme was afoot to defraud various creditors of the corporations through a New Jersey receivership thereof. The plan to defraud was outlined by Roth to Kohn, the attorney for the corporations, allegedly in the presence of Lawn without, allegedly, any dissent by Lawn. The plan was to offset debts owing by Roth and others (not Lawn) to the insolvent corporations against debts owing from the insolvent corporations to firms wholly owned by Giglio. This would have the effect of reducing the assets of the insolvent corporations available for distribution to other creditors (R. 1177).

The plan was outlined by Roth not earlier than July or August 1948, when Kohn was employed as an attorney in the New Jersey receivership (R. 2168, 2230).

How such plan could be tortured into evasion of 1946 taxes defies all logic. Lawn was neither a creditor nor a debtor of

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[80] *Grunewald* v. *U. S.*, 353 U. S. 391 (1957); *Krulewitch* v. *U. S.*, 336 U. S. 440, 442-3 (1949); *Fiswick* v. *U. S.*, 329 U. S. 211, 216-7 (1946); *U. S.* v. *Rosenblum*, 176 F. 2d 321 (7 Cir.), cert. den. 338 U. S. 893 (1949); *Cleaver* v. *U. S.*, 238 F. 2d 766, 769 (10 Cir. 1956); *Yokely* v. *U. S.*, 237 F. 2d 455 (9 Cir. 1956).

the corporations (R. 1127). It is plain that any alleged tax evasion plan could not have encompassed the subsequent action of a bona fide creditor throwing the corporations into involuntary receivership (R. 2167).

The mere doing of acts which are ambiguous in that they may or may not have had reference to the unlawful conspiracy alleged, cannot sustain a conviction. The acts must unquestionably relate to the conspiracy alleged.[81]

Further, any such alleged "conspiracy" was separate in personnel and content and remote in time from the alleged conspiracy in New York concerning taxes. To be connected with the conspiracy, any such alleged concealment through the New Jersey receivership would have to antedate September 12-15, 1947, when the returns were filed. The Judge so charged (R. 2717, 2718). Lawn cannot be held through the medium of the alleged New Jersey conspiracy.[82]

No proof that Lawn had value to conspiracy.

The totality of other testimony relating to the post-termination stage, subsequent to mid-September 1947, shows:

Lawn attempted to head off prosecution of the 1950 informations (R. 1218-19, 1237-39). Lawn discussed with other defendants the legal necessity of the Government to prove criminal intent in order to sustain a conviction (R. 1219); and Lawn discussed Roth's testimony before a New Jersey

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[81] *Dale* v. *U. S.*, 66 F. 2d 666, 669-70 (7 Cir. 1933), reversed as to the remaining defendant sub nom. *Massey* v. *U. S.*, 291 U. S. 608 (1934); *Parnell* v. *U. S.*, on rehearing 64 F. 2d 324, 329 (10 Cir. 1933); *Kotteakos* v. *U. S.*, 328 U. S. 750, 776-7 (1946).

[82] *U. S.* v. *Liss*, 137 F. 2d 995 (2 Cir.), cert. den. 320 U. S. 773 (1943). Of course Lawn's mere presence at the conversation did not make him a member even of the alleged conspiracy to defraud creditors, much less a tax evasion conspiracy. *Cleaver* v. *U. S.*, 238 F. 2d 766 (10 Cir. 1956). A conspiracy in fraud of creditors is not a conspiracy to conceal assets. *U. S.* v. *Camp*, 140 F. Supp. 98, 100 (D. Haw. 1956).

Grand Jury investigating Lawn's personal income taxes (R. 1075) which are not in issue here.

All of these alleged acts and statements made by Lawn, occurred after Lawn and the others had been arrested and arraigned under informations filed in 1950 (R. 2765-6). These informations related to the same alleged tax evasion as is alleged in the conspiracy at bar (R. 2783-4).

Obviously, the conspiracy had ended at that point, and whatever was thereafter said or done cannot possibly have been in furtherance of the conspiracy; and self-evidently it is impossible to join a conspiracy after it has ended.[83]

Lawn's alleged attempts to head off prosecution of himself were certainly natural reactions on his part in view of the circumstances. He was under information, he was being investigated; nothing could be more natural or proper than that Lawn should retain an attorney to discuss the information with the United States Attorney or that Lawn should communicate with the United States Attorney's superior in connection with the information. Since Lawn was being investigated in New Jersey it was certainly natural that he should discuss with Roth that Grand Jury matter. And it defies all common sense to believe that the discussion of a defense to a criminal action makes one a conspirator. Tested by any standards Lawn's reactions did not authorize a finding that Lawn was a conspirator.[84]

Further, these alleged acts to head off prosecution cannot constitute proof that Lawn was part of the alleged initial agreement to evade 1946 income taxes owed by others.[85]

The Solicitor General in his brief opposing certiorari pinned major reliance on a statement made by Roth in mid

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[83] Cf. *Rizzo* v. *U. S.*, 275 Fed. 51 (3 Cir. 1921).

[84] *U. S.* v. *Carenzella*, 198 F. 2d 3, 7 (7 Cir. 1952), cert. den. 344 U. S. 881 (1952); *U. S.* v. *Wainer*, 170 F. 2d 603, 606 (7 Cir. 1948).

[85] *Grunewald* v. *U. S.*, 353 U. S. 391 (1957).

1953, in Lawn's absence (R. 1218-19). Roth testified that he then told Giglio (R. 1218-19):

> "* * * we lulled ourselves to sleep with Howard Lawn's contact with the Department of Justice in Washington, in New York and in New Jersey, in order to prevent any indictments; and gradually we are going on the road to ruin, because all that protection and contacts have fallen down."

This statement was made not only after the conspiracy had ended and the informations had been filed, but after all of the defendants had been indicted for the precise crimes charged in the indictment at bar (R. 2766-82). Obviously, this statement of Roth's could not legally draw Lawn into conspiracy and was not binding on or evidence against Lawn.[56]

This statement of Roth was made in the absence of Lawn, and could not possibly be used to prove that Lawn was a member of the conspiracy. The Judge so charged (R. 2695) and that is unquestionably the law.[57]

The Solicitor General further contended that Lawn's *value* to the conspiracy lay in his alleged close connections with the United States Attorney's offices in New York and New Jersey, and the Department of Justice in Washington. The Solicitor General cited the following references for such contention (R. 329, 1074-5, 1217-19, 1237-9).

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[56] *Krulewitch* v. *U. S.*, 336 U. S. 440, 442-3 (1949); *U. S.* v. *Rosenblum*, 176 F. 2d 321 (7 Cir. 1949), cert. den. 338 U. S. 893 (1949); *U. S.* v. *Ah Kee Ing*, 241 F. 2d 157 (2 Cir. 1957).

[57] *Glasser* v. *U. S.*, 315 U. S. 60, 74 (1942); *U. S.* v. *Reina*, 242 F. 2d 302 (2 Cir. 1957); *Minner* v. *U. S.*, 57 F. 2d 506 (10 Cir. 1932); *U. S.* v. *Carcagella*, 198 F. 2d 3 (7 Cir. 1952), cert. den. 344 U. S. 881 (1952). Lawn's membership in the conspiracy could be shown only by his acts and statements and not the acts and statements of others. *U. S.* v. *Schneiderman*, 106 F. Supp. 892, 901 (S. D. Cal. 1952); *Bartlett* v. *U. S.*, 166 F. 2d 920, 924 (10 Cir. 1948); *Mayola* v. *U. S.*, 71 F. 2d 65, 67 (9 Cir. 1934).

Of these record references, R. 1074-5, 1218, 1237-9, do not support the contention of the Solicitor General even colorably. These relate to alleged unsuccessful attempts by Lawn to head off prosecution and have been discussed *supra*. The remainder of the record references relate to what someone told Lubben or Roth about Lawn in Lawn's absence. As matter of law and the Judge so charged (R. 2695) such extra-judicial declarations are not proof that Lawn was a party or had any value to the conspiracy.[88]

No proof that Lawn aided Giglio or ABC to conceal assets or that Lawn was paid for criminal services.

The Government made no attempt to link Lawn to that phase of the alleged crimes which encompassed filing false tax returns. The Government's attempt was solely to link Lawn to crime through an alleged plan to conceal the assets of Giglio and ABC so as to prevent the collection of taxes due from them.

These charges are repeated in Counts 7 and 9 as substantive crimes.

The alleged concealment of ABC's assets is then made to do double duty. It is argued that since Lawn received a salary for his legitimate employee services he diverted ABC's assets to his own use and was paid for his alleged criminal activities.

We dispose of these arguments shortly; and the refutation thereof requires acquittal on all counts as to Lawn.

The theory on which the concealment phase of the case was submitted to the jury was that the respective taxpayers correctly reported their incomes and taxes due, but that the taxpayers wilfully failed to pay the same. The jury was charged that guilt could only be predicated on a finding of

[88] See cases cited *supra*, ftn. 87.

intentional concealment of capital assets, at or about the due date of the taxes (September 12-15, 1947), to prevent collection of the taxes (R. 2716, 2718).

There was no concealment of assets.

The charge seems to be that Lawn in some unascertainable manner concealed in the Southern District of New York, Giglio's interest in a home, owned by Giglio and his wife as tenants by the entirety even though this piece of real property is located in Rumson, New Jersey, and that Lawn diverted ABC's assets to his own use even though the totality of assets received by Lawn was his salary for legitimate services rendered as an employee.

The facts in brief are:

Lawn, who was familiar with the geography of New Jersey since he was a resident thereof, set out to locate a house for Giglio and wife; introduced Giglio to a real estate agent and discussed the price of the house with the agent (R. 948, 951, 953).

In 1946 Giglio and his wife purchased, *as tenants by the entirety*, a home in Rumson, New Jersey, from the Barbour estate. Giglio and his wife took title to the house subject to a $50,000 mortgage (Ex. 161, R. 2056). Both the deed and the mortgage were publicly and promptly recorded in the clerk's office, Monmouth County, New Jersey (Ex. 161, R. 2056, 966).

On September 11, 1947 Giglio and his wife entered into a contract to sell their house to the Government's witness, Roth. Lawn introduced a reputable New Jersey real estate expert—a lawyer friend of his—to represent the Giglios on the closing. This was a New Jersey transaction. The introduction was perfectly legitimate (R. 1220, 1223). The contract was drawn in standard New Jersey real estate form (Ex. 100, R. 1224), by Tepper, the New Jersey real estate lawyer (R. 1224). The events leading up to this contract were:

Giglio was hard pressed for money and owed Roth some $20,000, and needed further sums to maintain the home, to meet mortgage and tax payments, and the like (R. 1220).

To induce Roth to advance a further sum of $10,000, and to secure the sums already owing to Roth and to protect the home in case of a future tax assessment, Giglio and his wife entered into a security arrangement with Roth under which Giglio and his wife conveyed legal title to the house to Roth and took back a second mortgage from Roth representing the Giglios' entire equity in the house (R. 1220, Ex. 53, R. 957, Ex. 55, R. 959). Both the deed to Roth and the mortgage from Roth to the Giglios were immediately and simultaneously recorded publicly, in the clerk's office, Monmouth County, New Jersey (R. 966, Ex. 53, R. 957, Ex. 55, R. 959).

On June 25, 1948, Roth sold the home to the Martins (Ex. 54, R. 959), took out of the proceeds of the sale the amounts owing from Giglio to him, and paid the balance less the first mortgage to Giglio (R. 1223, 1229). Giglio received $16,954.59 out of the proceeds of the sale.

The assets of ABC allegedly converted by Lawn were in fact, as shown by the evidence, only Lawn's salary received by him for legitimate employee services.

The Government's bill of particulars, which specified what was wrong with the corporate tax returns, underscores the legitimacy of Lawn's salary as a proper business expense to ABC:

> "a) Consolidation disallowed. $63,091.52 additional deduction allowed, consisting of $72,321.17 opening inventory allowed but not claimed, less $9,229.65 purchase expense disallowed." (R. 23)

The bill of particulars did not disallow one cent of expenses, which included Lawn's salary, deducted by ABC on its 1946 tax return (R. 23).

The Government thus necessarily conceded that the expense items so deducted were actually incurred, were reason-

able in amount, and were not wrongful diversions or appropriations by Lawn or the others.

The so-called withdrawals or diversions were traced into the very deductions which the Government specifically has allowed. The Special Agent, Mr. Present, did this tracing. He testified:

> "A. Well, there was usually an entry made to charge them either to selling expense or to one of the other entertaining expenses." (R. 1917)

> "Q. And you did not disallow any of these items, am I correct? A. No, sir, these were all in the year 1947, sir. There were similar withdrawals in the year 1946, though. None of those were disallowed." (R. 1919)

The so-called withdrawal by Lawn was the sum of $10,196.87, which Lawn received as salaries for services rendered in 1947 to all the corporations surnamed "American" (R. 1917). No allocation of any part of this total was identified as having emanated from the taxpayer, ABC. The Government agent, Mr. Present, testified that the payments to Lawn were in unspecified part salary due to Lawn, and that the total paid to him was charged on the books to various expense accounts (R. 1923).

The Government witnesses specifically proved that Lawn was an employee and was entitled to salary for services actually rendered (R. 1023). The unascertained portion of these salaries paid by ABC to Lawn were the sole assets of ABC received by Lawn; and there was no issue of excessiveness asserted in connection therewith.

Lawn did not sign any of the checks of ABC mentioned as being converted by others. Lawn did not receive any cash withdrawals from ABC. Lawn did not authorize anyone else to make withdrawals from ABC, and he had no authority to do so. Lawn did not have or maintain the accounting books and did not even know of the withdrawals.

On this record, there was no concealment.

Giglio's equity in the house, whether represented by title subject to mortgage or by a mortgage on the fee, was always a matter of public record. This equity was recorded publicly in the proper office and was at all times subject to levy by his creditors, including the United States, to whom notice was given by the public recording. Giglio did not prevent the discovery or withhold knowledge of his said equity.

Plainly, the "sale" of the house by Giglio and wife to Roth to pay or to secure past obligations and further advances was not concealment.[59]

The interest of Giglio in the fee was that of tenant by the entirety. This interest was not subject to immediate levy by creditors of Giglio unless he survived his co-tenant. However, his interest in the mortgage was subject to immediate levy by creditors. *Servis* v. *Dorn*, 76 N. J. Eq. 241 (1909).

In short the transactions between Giglio and Roth, far from constituting concealment, made an asset subject to levy which was previously not leviable.

The use or misuse of a taxpayer's funds is not concealment.[60]

No proof that Lawn had any stake in or rendered aid to any crime.

Lawn had no stake in the success of the alleged schemes, and did not aid and abet in any manner the transactions

---

[59] *U. S.* v. *Alper*, 156 F. 2d 222, 224 (2 Cir. 1946); *Iverson* v. *U. S.*, 47 F. 2d 451 (6 Cir. 1931).

[60] *Hersh* v. *U. S.*, 68 F. 2d 799 (9 Cir. 1934); "The crime of concealment is concealment. It is not an improper use of funds, it is not the use of corporate funds for personal expenses, it is not even the use of funds in fraud of creditors." *U. S.* v. *Camp*, 140 F. Supp. 98, 109 (D. Haw. 1956).

Concealment is neither the dissipation of nor the making of gifts of the taxpayer's funds. *U. S.* v. *Schiveson*, 116 F. 2d 881, 884 (3 Cir. 1940).

involved. For this additional reason, Lawn could not be held.[31]

Morei v. *U. S.*[32] is illustrative. In *Morei* one Beach approached the defendant Dr. Platt to purchase dope from Platt. Beach told Platt that he wanted dope to "soup up" race horses, that he would give Platt the names of the souped up horses, so that Platt, an inveterate horse bettor, could bet on them and win. Platt said to Beach that he (Platt) had no dope, but he gave Beach the name of the defendant Morei and told Beach to tell Morei that Platt had sent him and that Morei would take care of Beach.

The Court held that Platt was not guilty and held (pp. 831-2):

> "Dr. Platt was paid nothing and it is not claimed that he asked for any remuneration or expected to receive anything from the claimed transaction. Accepting the facts as contended for by the prosecution—which are squarely contradicted by the defendant—the only thing Dr. Platt did was to give Beach the name of Morei as a man from whom he might secure heroin to dose horses in order to stimulate them in racing. This is not the purposive association with the venture that, under the evidence in this case, brings Dr. Platt within the compass of the crime of selling or purchasing narcotics, either as principal, aider and abettor or accessory before the fact."

At bar it is not even claimed that Lawn received any remuneration or expected to receive remuneration for any illicit venture. There is no proof that the lawyer who was introduced by Lawn was sought by Giglio to do an illegal

---

[31] *Nye and Nissen* v. *U. S.*, 336 U. S. 613, 619 (1949); *U. S.* v. *DeRe*, 139 F. 2d 818 (2 Cir. 1947) affd. 332 U. S. 581 (1948); *Thomas* v. *U. S.*, 239 F. 2d 7, 10 (10 Cir. 1956); *U. S.* v. *Moses*, 220 F. 2d 166 (3 Cir. 1955); *Hubby* v. *U. S.*, 150 F. 2d 165 (5 Cir. 1945); *Morei* v. *U. S.*, 127 F. 2d 827 (6 Cir. 1942); *U. S.* v. *Peoni*, 100 F. 2d 401, 402 (2 Cir. 1938); *U. S.* v. *Dellaro*, 99 F. 2d 781 (2 Cir. 1938).

[32] 127 F. 2d 827 (6 Cir. 1942).

act. The Government's contention at the very worst for Lawn is, that Lawn gave Giglio the name of a lawyer who could prepare proper legal papers and handle a New Jersey title closing, and that Lawn was an employee of ABC and drew salary for his legitimate services as such employee.

Whatever the Government's theory may be, there is no proof that Lawn had any stake in or that he entered into any of the planning of wrongdoing or accepted any alleged wrongful purposes of the taxpayers.

Lawn cannot be held for what others may have done.[92]

Confusion and not proof of crime explains the verdict.

The record is crystal clear that Lawn found himself "confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of [the] existence of the conspiracy itself."[93]

It is the inescapable conclusion from a painstaking reading of the tediously long record herein that the jury's verdict against Lawn was based on automatic reaction to the coupling of Lawn's name with that of the others in a welter of trivia and innocent transactions. Suspicion grounds the verdict herein, not evidence.

The verdict and indictment against Lawn should not stand.[93]

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[92] *Thomas* v. *U. S.*, 239 F. 2d 7, 10 (10 Cir. 1956); *Chaser* v. *U. S.*, 238 F. 2d 766, 771 (10 Cir. 1956); *U. S.* v. *Andolschek*, 142 F. 2d 503, 507 (2 Cir. 1944); *U. S.* v. *Zeuli*, 137 F. 2d 845, 847 (2 Cir. 1943); *Donovan* v. *U. S.*, 54 F. 2d 193 (3 Cir. 1932); and see *People* v. *Baldisero*, 266 App. Div. (N. Y.) 909, c. 3 (4th Dept. 1943).

[93] *Krulewitch* v. *U. S.*, 336 U. S. 440, 453 (1949) (Jackson, J.).

[93] *Kotteakos* v. *U. S.*, 328 U. S. 750, 776-7 (1946); *Wise* v. *U. S.*, 241 F. 2d 545, 547 (5 Cir. 1957); *Thomas* v. *U. S.*, 239 F. 2d 7, 10 (10 Cir. 1956).

VII.

THE JUDGMENT AGAINST PETITIONER SHOULD BE REVERSED AND JUDGMENT OF ACQUITTAL DIRECTED.

Respectfully submitted,

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Schedule.

THE TOTAL TESTIMONY AS TO LAWN IN THE RECORD.

Lawn present, Lawn said or did something

R. 333, 364, 883, 989, 1006, 1019, 1070, 1074-5, 1092, 1112-13, 1122-3, 1123-4, 1134, 1144-5, 1150, 1175, 1216-17, 1219, 1220, 1222-3, 1237-9, 1245, 1470, 1525, 1532, 2053, 2057.

Lawn present or may have been present, Lawn said or did nothing

R. 301, but *cf.* 637 and 839, 319-20, 332-3, 367-69, 370-1 but *cf.* 840-43, 883, 997, 1005, 1149, 1175-6, 1177, 1182.

Lawn not present; Lawn spoken about

R. 318, 329, 362, 883, 1018, 1021, 1073, 1115, 1135, 1141-2, 1153, 1298, 1373, 1374-5.

Prosecutor injects Lawn's name; Government witness rejects

R. 303, 309-10, 329, 348, 352-3, 376, 377, 397, 974, 998, 1004, 1024, 1026, 1095, 1119, 1126-1, 1125, 1128, 1134, 1135, 1136, 1140-1, 1141, 1142, 1148, 1181-2, 1581, 1585, 1687, 1724, 2019, 2020, 2058, *2151, 2207, 2248, 2249, 2279, 2315, 2316.*

Witness excludes Lawn's presence although Lawn not mentioned by name

R. 317, 358, 826, 930-2, 938-9, 983, 1008-9, 1017, 1028, 1029, 1031-2, 1036, 1066, 1067, 1069, 1072, 1072, 1077-9, 1099, 1101-3, 1114-5, 1126-7, 1184, 1234-6, 1246-7, 1409-10, 1726-7.

Miscellaneous references to Lawn

R. 326, 327, 329, 362, 410-11, 306, 626-7, 629-38, 946, 947, 948-50, 951, 952-3, 961, 962, 970-1, 981, 1023, 1116, 1127, 1134, 1138, 1155, 1167, 1203, 1248, 1295, 1886-7, 1907, 1910-11, 1913, 1915, 1917, 1922, 1923, 2051, 2052, 2054, 2070, *2154, 2155, 2196-7, 2227, 2230, 2231, 2232, 2245, 2261, 2279, 2280, 2313, 2419-20, 2433.*

References to pages in italics are to evidence taken after the case as to Lawn was rested on both sides (R. 2116).

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No. 9

In the Supreme Court of the United States

OCTOBER TERM, 1957

HOWARD LAWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 2963-2972) is reported at 232 F. 2d 589.

JURISDICTION

The judgment of the Court of Appeals was entered on April 20, 1956. (R. 2972.) A petition for rehearing, filed on April 26, 1956 (R. 2977), was denied on May 8, 1956 (R. 2996). The petition for a writ of certiorari was filed on June 4, 1956, and was granted on October 15, 1956 (R. 3002). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether it was reversible error to introduce in evidence one photostatic copy rather than another o a check and check stub as to which petitioner had waived any privilege.

2. Whether it was reversible error for the prosecutor on summation to say that he believed certain witnesses were telling the truth, no objection having been made and defense counsel having previously suggested that the prosecutor had been instructed or he never would have put the witnesses on.

3. Whether petitioner was accorded both a fair opportunity for cross-examination and other procedural safeguards against the use at the trial of allegedly tainted evidence.

4. Whether the evidence was sufficient to support the verdict.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more

than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C 1952 ed., Section 145.)

SEC. 3793. PENALTIES AND FORFEITURES.

* * * * *

(b) *Fraudulent Returns, Affidavits, and Claims.*—

(1) *Assistance in preparation or presentation.* Any person who willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document, shall (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document) be guilty of a felony, and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 3793.)

18 U. S. C.:

S. C. 371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission o
which is the object of the conspiracy, is a mis
demeanor only, the punishment for such con
spiracy shall not exceed the maximum punish
ment provided for such misdemeanor.

STATEMENT

On July 23, 1953, a 10-count indictment was file
in the United States District Court for the Southern
District of New York, charging violations of the in
ternal revenue laws (Sections 145 (b) and 3793 (b
of the Internal Revenue Code of 1939) and of the
general conspiracy statute (18 U. S. C. 371). Name
as defendants were William Giglio, Frank Livors
(see *Giglio and Livorsi* v. *United States*, No. 10, thi
Term), Louis Roth, and the petitioner, Howard Law
The essence of the charges may be summarized as
follows (R. 10-21):

Count	Individual Defendants*	Charge
1	Giglio, Roth	
2	Giglio, Roth	
3	Giglio, Roth	
4	Giglio, Roth	
5	Giglio, Roth	
6	Livorsi, Roth	
7	Giglio, Livorsi, Law, Roth	
8	Livorsi, Law, Roth	
9	Giglio, Livorsi, Law, Roth	
10	Giglio, Livorsi, Law, Roth	

* Each of the substantive counts was directed against the individual defendants named therein. In each conspiracy count, the defendants named therein were charged with conspiring with each other and with unindicted co-conspirators.

Roth pleaded guilty and testified for the prosecution, and Lawn, Giglio, and Livorsi (hereafter described as the petitioners)[1] were found guilty as charged after a jury trial lasting six weeks. (R. 3, 7, 2735.) Lawn was sentenced to a year and a day on each of three counts, the sentences to run concurrently. (R. 2761.) In an opinion by Chief Judge Clark, the Court of Appeals unanimously affirmed. (R. 2962–2972.)

A. EVIDENCE TO SUPPORT THE VERDICT

To establish its case, the Government offered evidence (1) that the petitioners conspired to evade assessment and payment of federal income taxes on over a million dollars of income earned in the sugar black market of World War II; (2) that petitioners operated through the media of several partnerships and corporations; (3) that Giglio and Livorsi were the principals in the conspiracy, Giglio being the chief executive of most of the companies, and Livorsi having an equal interest with Giglio in all of the enterprises; and (4) that Lawn and Roth provided the legal and accounting services required to carry out the conspiracy.

In broad outline, the Government submitted proof that the petitioners employed three methods to evade

---

[1] This is a consolidated case to No. 10, this Term, *Giglio and Livorsi v. United States*, to be argued immediately following this case. All three petitioners were convicted as co-conspirators at a common trial where they had the same counsel. In view of the impossibility of separating the evidence of the conspiracy from that of the part which each played, the full factual statement is set forth in this brief and reference will be made in the Government's brief in No. 10.

tax assessments. One method was the fraudulent allocation of income among the many companies and individuals in the conspiracy, resulting in application of a much lower tax rate than would have been applied if the income had been properly reported by those to whom it was taxable. The second method was the gross overstatement of expenses in the income tax returns, and the third method, less extensively used, was omission of income. Moreover, the Government offered proof that the petitioners were not content with evading assessment of much of their tax liabilities, but also evaded *payment* of over 97% of the taxes which were admittedly owed. This evasion of payment was accomplished in two ways. First, tax liability was concealed from the Government for as long a time as possible. Second, all assets were concealed by the time Government collection procedures were instituted. The Government also undertook to show that in order to prevent the Government from detecting the evasions the conspirators had destroyed and fabricated evidence and had attempted to intimidate prospective witnesses. The details of this proof may be summarized as follows:

1. *The Eatsum partnership.*—Between April 1944 and May 1945 David Lubben conducted the business of Eatsum Food Products Company as a sole proprietorship, engaging in the purchase, sale and manufacture of candy. (R. 294–295.) Sugar was rationed, and Lubben, having no ration quota, bought what sugar he could obtain in the black market. (R. 295, 298.) Louis Roth, an accountant, had been hired by petitioners Giglio and Livorsi to "legitima-

tize" money they had made. (R. 1235.) He advised Lubben that their organization owned a jelly plant, Tavern Fruit Juice Co., which had just received ration certificates for fourteen million pounds of sugar, and that he was sure that with their connections they could get a sugar quota for Lubben. (R. 298, 324.) Roth stated that his organization was interested in Lubben's business, and he got Lubben's permission to bring in an accountant to go over Lubben's books. As a result, on June 12, 1945, a partnership was formed known as Eatsum Food Products Company, Ltd. (R. 298, 300, 302–303.) Lubben and Giglio were general partners, each, with their associates, owning 50% of the business. (R. 300, 302–303.) Livorsi owned a half of Giglio's interest in Eatsum, just as he did in Giglio's other enterprises. (R. 1074, 1187, 1543.)[6] Lubben's sole reason for selling an interest in Eatsum was to get a sugar quota. (R. 841.)

2. *Cash deals.*—In his pre-partnership black market transactions Lubben had always kept a careful record of his under-the-table currency payments to suppliers, drawing checks to cash for such amounts, recording the currency payment on the invoices, and reflecting the true cost of the merchandise on his books. (R. 304–305, 1721–1723.) Shortly after Eatsum became a partnership, Lubben was advised by Roth that neither he nor Giglio wanted black market currency payments to be recorded in the future because in that

[6] The Giglio group consisted of Giglio and Livorsi and their wives, and a relative of Giglio, one Lopertido, who owned only a 5% interest. (R. 302–303, 909–910.)

way "you may involve other people that you ha
given this cash to." (R. 309, 1026–1027.) As a r
sult, Roth instituted a cash box system, whereby th
proceeds of cash sales of candy were placed in a bo
from which currency was paid out in black marke
transactions. (R. 309, 1027, 1418.)

In the summer of 1945 there came into existence
second cash box, referred to as the "corn box." (4
315–316, 1418, 1544–1545.) At that time corn syrup
like sugar, was very scarce. Manufacturers allocate
it to their old customers on a quota basis, and Eatsu
had no such quota. (R. 316.) Lubben learned tha
some corn farmers in the west had plenty of corn bu
would not release it to the corn refineries until the
received a black market premium. (R. 316-317.
Lubben so advised Giglio, pointing out that if the
could get corn delivered to refineries by paying pre
miums to farmers, they could then get corn syrup
from the refineries. (R. 317.) Giglio replied that
"sounded very good and he would check it with" peti
tioner Lawn, another employee. (R. 318.) Giglio
told Lubben that Lawn "was a former United State
District Attorney, and that he had a terrific entry
with some of the highest government offices and tha
he was a part of the organization, and that he [Giglio
felt that Mr. Lawn was there to prevent any trouble."
(R. 329.) A refinery was found, a check was drawn
to cash, and an agent of Eatsum began to pay cur
rency premiums to the farmers. (R. 319-320.)

When the corn syrup began to arrive, Giglio told
Lubben, in the presence of Roth, that he "was not in
this business just for the sake of becoming a large

taxpayer" and that "this opportunity was going to make a fortune and he was not going to pay it all out in taxes * * *." (R. 337.) Giglio accordingly insisted that the syrup be sold at an invoice price plus "a cash amount over". (R. 337–338.) Thereafter, the over-invoice amounts were received in currency and kept in the corn box. (R. 344–345.) Three or four weeks after the corn syrup deal got under way Giglio advised Lubben that he should no longer concern himself with buying the corn because "Howard Lawn had much better connections and that he would take care of it." (R. 333.) Lawn verified this, and told Lubben that with his connections they "could get it better and cheaper and faster * * *." (R. 333.)

Within a period of three or four months in the latter part of 1945 [illegible] in currency went through the corn box. (R. 356–357, 1091, 1544–1545.) None of this money was recorded on the books. (R. 358, 921, 1723.) Some time in the autumn of 1945 Giglio told Lubben that he had taken the corn box to his home and placed it in a safe because "it was too much money to be kept in the office." (R. 348.) At that time the box contained approximately $140,000 in cash profits, none of which was ever recorded on the books or reported as income in the partnership return. (R. 358, 384, 921, 1023–1025, 1031, 1723, 1853–1854.)

3. *Fraudulent allocation of income to corporations.*—In about September 1945, Lubben was called into Giglio's office. Roth was present and, to the best of Lubben's recollection, so was Lawn. Giglio stated that the profits from candy and corn syrup were "becoming terrific, and that he wasn't [illegible] to pay

ing a lot of income tax and something had to be don
and done quick." (R. 367.) Giglio said that it ha
been decided to form a number of corporations
syphon off the profits of Eatsum by means of fal
invoices; that these corporations would be in existen
only a few months, and would be dissolved before
came time to pay income taxes so that they wou
not have to pay; and that Roth would provide furth
details. (R. 367-368.) Roth did so. (R. 368-369
Lubben advised them that he "wanted no part" of an
such arrangement. (R. 368.) When Lubben was
vacation in January 1946, Giglio told Beren, Lu
ben's accountant, that he had formed a new corpora
tion to take over the assets of the Eatsum partne
ship, and suggested that Beren try to convince Lubbe
that it would be to his advantage to operate as a co
poration rather than a partnership. (R. 1688, 172
1727.)

Early in March 1946, Lubben, having decided
withdraw from the Eatsum partnership, asked f
his $70,000 share of the corn box profits. Giglio r
torted that Lubben had no such money coming to hi
and, in the presence of Livorsi, Roth and others, o
dered him to "get the hell out" of the office. (
358-359.) Over the protests of Giglio, Roth an
Lawn, Lubben withdrew from the partnership o
March 9, 1946. (R. 359-360, 361-362, 399-400, 172
1727.) The preliminary dissolution agreement pro
vided that, in return for Lubben's 50% interest i
Eatsum, Giglio would assign the plant and equipment
to Lubben and assume payment of that portion o
Lubben's liability for 1946 federal income taxes whic

was attributable to Lubben's share of the profits of Eatsum for the fiscal year ended May 31, 1946. (R. 399, 1763–1765.) Lubben agreed to buy the Eatsum inventory of merchandise for $339,052.77 (R. 401–402, 1697–1698), a part of which was to be paid off in a series of forty notes, payable weekly to Giglio, in the amount of $2,500 each (R. 364, 381, 402). At about the time of the dissolution Roth asked Giglio, "What about the cash box?" and Giglio replied: "Never mind, I took care of that." (R. 1029–1030.)

With the departure of Lubben, Giglio and Livorsi became virtually the sole owners of the Giglio group of enterprises with offices at 29 Rector Street, New York City. (R. 325.) Chief among these was the American Brands Corporation, which had been incorporated on January 8, 1946 (R. 1865–1866, 1878), and which had taken over the business of the Tavern Fruit Juice Company, a partnership owned by Giglio and Livorsi and their wives. (R. 1152, 1131.) The minute book of this corporation disclosed that Giglio and Livorsi and their wives held 98% of the 1,000 outstanding shares, and Lawn and Roth one share each. (R. 1912–1913, 2046.) Giglio was president and treasurer, Lawn was vice-president, and Roth was secretary. (R. 1915.) During Lubben's association with the group, Tavern had engaged in the manufac-

ture of jelly, which it sold to Eatsum. (R. 324, 34
1152.) Near the end of November 1945, Tavern ha
ceased making sales but continued to manufactu
jelly and acquire inventory. (R. 1240, 1924.) N
closing inventory was included in computing the ta
able income of Tavern for its last taxable year. Th
inventory was sold by The American Brands Corpo
ration during the first few days of its existence, i
January 1946. (R. 1877-1878.)

4. *Organization and ownership of corporations.*
The business of the Eatsum partnership was take
over by a second new corporation, American Brand
Wholesale Corporation, incorporated March 23, 1940
(R. 1152, 1912.) Also incorporated at approximately
the same time were the American Agar Corporation
(which engaged in research relating to the manufac
ture of sugar, jellies and jams), the American Sweet
Corporation, and the American Trucking and For
warding Corporation. (R. 1131, 1912.) Although the
stock certificate books show that Lawn held substantia
interests in four of the companies (R. 2946), Giglio
told Roth and others that he (Giglio) and Livorsi
were 50-50 owners of all the enterprises except Ameri
can Agar Corporation, in which Lawn had a 25%
interest (R. 1074, 1116, 1187). Giglio gave Lawn
these shares, over Livorsi's objections, in considera
tion of work done by Lawn on research. (R. 1141
1142.)

Although Livorsi owned half the business, [illegible]
he had no separate office of his own, being in charge
of jelly production at the Tavern (later American
Brands) plant. (R. 327, 1585, 1588.) When he came

to 19 Rector Street he invariably conferred with Giglio. (R. 327–328.) Giglio was, of course, accountable to Livorsi for half the profits (R. 1073–1074) and for this reason Livorsi signed unusual or "special" checks, so that both he and Giglio would know what they were for (R. 1073). On some occasions, when Giglio wanted money he would get it from Roth by having the latter draw and cash a company check which would be payable to Roth and which would be recorded on the books as a company loan to Roth. The purpose was to avoid complaints which would be made by Livorsi if he knew that Giglio was getting the money. (R. 1073–1074.)

Roth supervised the bookkeeping and prepared the tax returns, although the final decision "of what to do rested with Mr. Giglio." (R. 1076.) Before he became associated with Giglio and Livorsi, Roth was earning between $10,000 and $15,000 a year; afterward, about $50,000 a year. (R. 1236–1237.) Roth admitted that reasonable compensation for his services would have been less than he got. (R. 985–986.)

5. *Fraudulent bookkeeping entries.*—After the formation of the "American" corporations, a number of devices were used to evade taxes. No income tax was withheld on the salaries or other drawings of Giglio, Livorsi, Lawn or Roth. (R. 1183, 1922–1923.) Giglio advised Roth that it would be necessary for Giglio to withdraw more money from the business than the books would reflect. Roth first suggested that Giglio withdraw the money and pay taxes on it, but Giglio instructed Luigi to withdraw the funds and charge them

to various expense accounts. (R. 1009.) Roth then devised a system of distributing such withdrawals to various expense accounts "so that it looks good when an examiner comes down, a revenue agent comes down to examine the books." (R. 1009.) Substantial drawings were made under this system. (R. 1010–1011, 1014.) On one occasion Giglio inquired as to the bank balance of a small associated corporation known as the Barlan Corporation. (R. 383, 1188.) Roth advised him that it was in excess of $10,000, whereupon Giglio instructed Roth to draw a check in favor of Giglio's brother, Raymond, in the amount of $10,000, and to "try to use it as a deduction for expenses." (R. 1188, 2313.) Roth did so, cashed the check, and turned the proceeds over to Raymond Giglio in bills of $20, $50 and $100 denominations. (R. 1188–1191.) As Roth summed it up on cross-examination, "There were a great many entries on the books that were fraudulent." (R. 1535.)

6. *False and delayed returns.*—On March 12, 1946, Roth prepared and filed a declaration of Giglio's estimated individual income tax for 1946, showing an estimated tax of $4,000. The first quarterly payment of $1,000 accompanied the estimate. (R. 1040, 1081, 1836.) In or about June 1946, Roth prepared an amended declaration, estimating the tax at $11,000. Giglio refused to file this, ordering Roth to "duplicate the first declaration". (R. 1040–1041.) This was after the close of the fiscal year for both the Eatsum and Tavern partnerships, and Giglio's distributive share of [illegible] in the ventures [illegible] on his

1946 individual return) was shown by the books (exclusive of unrecorded and unreported income) to be in excess of $170,000. (R. 1004, 1838, 1870, 2934, 2939, 2943.)

The partnership return of the Tavern Fruit Juice Company was due to be filed June 15, 1946, inasmuch as its fiscal year had ended March 31, 1946. (R. 1003–1004, 1838.) The return for the Eatsum partnership was due to be filed August 15, 1946, its fiscal year having ended May 31, 1946. (R. 1004, 1838, 1870.) At about the time these returns were due, Giglio instructed Roth not to file them, pointing out that such a course was necessary so that the Government would not "be apprised or have knowledge or some record that there is money due * * *." (R. 1004.) Around September 1946, Roth prepared an amended declaration of Giglio's estimated individual income tax for 1946, putting the amount at $11,000. Giglio, as he had done three months earlier (*supra*, p. 14), instructed Roth not to file that document but to "duplicate the first declaration", which had estimated the tax at $1,000. (R. 1040–1041.) In January 1947, Roth refused to "go along on those declarations because they [were] 'way out of line" (R. 1078), and insisted upon filing an amended declaration estimating the tax at $26,000. Giglio reluctantly agreed to file such a declaration, but instructed Roth to send only the usual quarterly check for $1,000. (R. 1078–1079.) Giglio's income tax liability for 1946, as reflected on the final return eventually filed, was $232,978.73, of which only $88,000 had been paid at the time of the trial. (R. 2947.)

In the spring of 1947 tentative tax returns for the American Brands Corporation and two other "American" corporations were filed, each showing an estimated income tax liability for 1946 of $100. (R. 1119-1120, 1922.) The tax liability reflected on the consolidated return eventually filed in September was $104,701.35. (R. 2945.) Much of the cash which American Brands had in the spring had been dissipated by the time the return was filed. (R. 1523-1530.)

With the end of sugar rationing in the spring of 1947, the profitable war and post-war black market in sugar and its substitutes came to a halt. The Giglio-Livorsi enterprises "began to go downhill" (R. 1530), and Roth estimated that in six or seven months in the early part of 1947 "the various corporations sustained a loss of about $150,000" (R. 1243), as compared with a book profit of $342,152.97 in 1946 (R. 2945). Between March 1947, and mid-September 1947 (when the returns were all overdue), no returns were filed by the corporations, individuals or partnerships, although some of these returns had been prepared six or seven months earlier. (R. 1002, 1031, 1171, 1197.)

The return of the Tavern Fruit Juice partnership was filed September 12, 1947, fifteen months late. (R. 1004, 1497.) Roth did not sign it because he knew it was false. (R. 987.) It was false in that it omitted a closing inventory (*supra*, p. 12) in the amount of $72,321.17 and overstated "Experimental and Research Expense" by $32,780.93. (R. 988-989, 991-993, 1070, 1876-1877, 1881-1885, 2039-2040.)

The return of the Eatsum partnership was filed in September 1947, thirteen months late. (R. 1004, 1838.) It was false in that it omitted the $140,000 profit in the corn box from the corn syrup operation (*supra*, pp. 8-9, 10). (R. 358, 920-921, 1024, 1850, 2031.)

Roth filed the return of the "American" corporations for the calendar year 1946 on or about September 15, 1947. That return was filed only four months late because Roth had secured extensions of time to May 15, 1947 to file it. (R. 1007-1008, 1474, 1922.) That return was false in that it was a consolidated return of five corporations, showing American Brands as the parent. American Brands was not the parent and Roth knew that separate returns were required to be filed. (R. 1038, 1111, 1113, 1850, 1905-1909, 1911.) The understatement of income tax resulting from the improper consolidation was $86,207.11. (R. 1906-1907, 1909-1910, 2045.)

The 1946 individual income tax returns of Giglio and Livorsi were filed, like those of the partnership and corporations, about September 15, 1947. The time for filing these returns had been extended to either June or July 1947. (R. 1007-1008, 1474.) Roth did not sign the returns because he knew they were false. (R. 1037.) They were false in that they each understated by $40,436.22 the partners' distributive share of profits from the Tavern Fruit Juice partnership (*supra*, pp. 12, 16; R. 2039-2040, 2043-2044) and each omitted $20,780.23 of profits realized from the sale of five tank cars of corn syrup received

shortly after Lubben's departure (R. 392–397, 1030–1031, 1892–1896, 2942–2944).[1] No returns were filed on behalf of the wives (R. 1888), the wives being claimed as exemptions and their supposed share of the profits from both of the partnerships being reflected on the husbands' returns (R. 997–998, 999–1001). This was done at the suggestion of one Ronayne, a tax consultant,[2] who pointed out that since they did not intend to pay the tax, there was no use in causing trouble for the wives. (R. 1000–1003.) As Roth explained it, "it was never intended at that time to pay" the tax and therefore the wives

[1] It should be noted that there was a further understatement of income on the individual returns by reason of (1) the omission of the cash profits in the corn box, totaling $140,000 (*supra*, pp. 8–9, 10, 17), partially offset by an item of $30,000 reported by each of the two partners on their individual returns as miscellaneous income; and (2) an improper distribution of profits on the Eatsum partnership return, picked up on the individual returns. (R. 1031–1033, 1854–1855, 1860–1861, 1987–2018, 2934, 2943–2944, 2947.) However, the trial judge withdrew from the jury's consideration the whole issue of unreported income from Eatsum on the individual returns (Counts 5 and 6) because of legal issues relating to the difference between a partner's distributive share of income and the amount he actually receives. (R. 13–14, 1981–2018, 2444–2486, 2722–2725, 2728–2731.)

[2] Ronayne, who was formerly associated with the Treasury Department, was retained in 1946 at a fee of $10,000 per year, to supervise generally all tax matters involving the Giglio-Lavorsi enterprises. (R. 352–353, 999, 1076.) Although the declarations of estimated tax (*supra*, pp. 14–15) had been filed in the Second Collection District, Ronayne instructed Roth to file the final returns in the Third Collection District because "he is in a better position to take care of the tax examination from the Third District than he is from the Second District." (R. 1076.)

income was reported on the husbands' returns "so that all the trouble would accrue to the husbands." (R. 1003.)

7. *Liquidation and concealment of assets:* The 1946 individual and corporate returns, as filed, reported a total income tax liability of $573,683.73. As of the time of the trial, in 1955, a total of $16,735.95 had been paid on these obligations. (R. 2947.) These returns, as well as those of the partnerships, were all filed between September 10, 1947, and September 15, 1947. (R. 1002, 1474.) By that time, or within a few days thereafter, the visible assets of the individuals and the companies had been, for all practical purposes, liquidated.

Between March 15, 1947, when the tax returns were due, and September 15, 1947, when they were filed, Giglio withdrew from the corporations a total of $58,808.34, and Lavorsi, a total of $30,058.33, including their salaries. (R. 1921–1922, 1923.)[1] In September 1947, the corporations sold their furniture and fixtures for $10,000. (R. 1192–1193.)

During the spring of 1946, Giglio had become interested in purchasing a home in northern New Jersey. Lawn introduced him to a realtor, who showed them several "fine homes, estate homes". (R. 948–949.) Giglio expressed a preference for the home of the late Senator Warren Barbour and, after brief negotiations, purchased it for $100,000. (R. 949, 951–952.) About two weeks later, Lawn and Giglio advised the

[1] Earlier in 1947 Lavorsi's drawings were even heavier. From the beginning of that year to mid-June he withdrew $36,558.33. (R. 1916–1917, 1922–1923.)

realtor that an associate of theirs might be interested in buying the estate of boxing promoter Mike Jacobs. Lawn and Giglio introduced Livorsi to the realtor, who took them to see the property. Jacobs was asking $100,000 and Livorsi's highest offer was $85,000 (R. 961.) A week or two later, however, Lawn, Giglio, Livorsi and the realtor went to see Jacobs. It was suggested that the realtor "wait outside with the ladies." (R. 961–962.) When he returned he was advised that a price of $90,000 had been agreed upon. (R. 962.)

In mid-September 1947, Livorsi sold this estate for $85,000. After deduction of $11,070.26 to cover an outstanding mortgage, and various other adjustments, Livorsi received a check on September 19, 1947, in the amount of $64,335.49. (R. 962–963, 2059–2060.) On September 25, 1947, Livorsi cashed this check at a New Jersey bank, received the money mostly in $100 bills, put it in his belt and walked out. (R. 2062–2065, 2072.)

Early in September 1947, Roth was called into Lawn's private office, which was next to Giglio's. (R. 327, 1229.) Giglio, in Lawn's presence, said he would "sell" his $100,000 home (*supra*, p. 19) to Roth in consideration of $20,000 that Giglio owed Roth, plus certain "additional money in order to keep up the payments, and in that way I will have a roof over my head in case the Government assesses me and will not be able to take the house * * *." (R. 1226–1224.)

Livorsi had sold certain personal property for $3,050 at this time and received a separate check for that amount. (R. 2058, 2060.)

oth consented. Lawn "agreed that it would save r. Giglio's home, and protect" Roth, and stated that would have a New Jersey lawyer acquaintance aw up the papers. (R. 1220.) It was understood at Roth would make payments on the mortgage and xes, and that when the house was finally sold he uld get back his money plus the $20,000 Giglio ed him. (R. 1221.) Several days later, on Septem- r 11, 1947, the closing took place in Lawn's office. e papers had been drawn up by an attorney named pper, who handled the closing. Although Tepper l not represent Roth, Roth gave him a check for 0 at Lawn's suggestion in order "to make it look od". (R. 1220, 1222.) Roth wrote two checks of 00 each in favor of Giglio, assisted him in cashing m, and Giglio left the bank with $10,000 in bills of , $50 and $100 denominations. (R. 1223, 1225- 26.) On September 19, 1947, Giglio sold his interest a company known as the Van Dyk Industrial Cor- ration, receiving a check for $15,000 which was de- sited in the bank account of the American Brands rporation. (R. 1170-1171.)

During October and November, 1947, Giglio, Law l Roth discussed the desirability of receivership bankruptcy. Lawn suggested that it would be more vantageous to go into receivership in New Jersey . 1245.) New Jersey receivership proceedings, in ving American Brands and the related corpora- ns, began on December 2, 1947, with the filing of reditor's complaint for approximately $4,500. (R.

The estate had been put up for sale in the spring of 1947 remained unsold. (R. 969-970.)

2154, 2160, 2206.) During the receivership proceedings, Roth gave false testimony by pre-arrangement with Giglio and Lawn. (R. 1143, 1175–1180, 1532, 1534.) The sale of the corporation's assets netted $22,818.06, of which about $10,000 went for receiver's fees. General creditors received about 10% of their claims. (R. 2189–2190, 2233–2234, 2350, 2417–2418.) The plant of American Agar Corporation, which had cost in excess of $200,000 (R. 1923–1924), was sold by the receiver for $15,000 (R. 2264–2265); a few years later Giglio, through the Heparin Company, was still operating that plant (R. 2316–2317, 2319).

In 1950 Giglio went through bankruptcy in New Jersey. Only thirteen days before he signed the schedules in bankruptcy he had sold his automobile for $1,400 cash, none of which was turned over to the trustee. Substantially all of his assets were already in his wife's name, the balance being sold to her in the bankruptcy proceedings for $100. (R. 2269–2279.)

8. *Attempted intimidation of Beren.*—Although Lubben's actual withdrawal from the Eatsum partnership had taken place on March 9, 1946 (*supra*, p. 10), the formal dissolution agreement had not been signed at that time, nor had title to the plant been transferred to Lubben in accordance with the preliminary dissolution agreement. (R. 410–411, 1699, 1762–1764.) Late in the spring of 1946 Lubben called upon his accountant, Beren, and advised him that Giglio refused to give him title to the plant which Lubben was then operating as General Confections,

Inc.) unless he would agree to the destruction of all of Bereu's working papers relating to the Eatsum partnership. (R. 1699.) Bereu had made an extensive monthly audit for Lubben of Eatsum's operations* every month through January 1946, and had a large file of working papers, including monthly financial statements. (R. 1408–1409, 1688, 1700.) Bereu told Lubben that working papers belonged to the accountant who had prepared them, and not to the client. Lubben replied that Giglio insisted that the working papers be turned over to him or destroyed; otherwise he "simply would refuse to go through with any deal with Mr. Lubben." (R. 1700.) Bereu finally consented to permit Giglio to destroy the papers, but, before the destruction was accomplished, Bereu had photostatic copies made of the most important ones. (R. 1700.) Shortly thereafter Giglio and Roth called upon Bereu. Roth and one of Bereu's assistants systematically destroyed working papers belonging to Bereu, tearing them up, flushing some down the toilet, and carting others out in waste baskets. (R. 1099–1101, 1420, 1700, 1744.) Giglio told Bereu that the papers were being destroyed because Giglio "wanted to know that his partnership affairs were kept within his control and that no outsider knew anything about them", and warned Bereu that they had ways of taking care of any man who talked about their affairs out of turn. (R. 1701.) Thereafter, on June 5, 1946, the formal dissolution

* Except the corn box operations (*supra*, pp. 8–9), which Roth would not permit Bereu to audit, and which did not appear on the books. (R. 1723.)

agreement of the Eatsum partnership was executed. (R. 410–411.)

9. *Attempted intimidation of Lubben.*—In September or October 1948, Treasury Agent Theodore Present was assigned to a joint investigation of the income tax returns of Lubben, Giglio, Livorsi and the Eatsum and Tavern partnerships. (R. 1835, 1928, 1931.) Even before that time a Treasury agent named Twohig had been engaged in a similar inquiry, and in the summer of 1948 had interviewed Lubben. (R. 461–463, 1930.) When Lubben's 1946 income tax return was being prepared, his accountant had been obliged to reconstruct Lubben's distributive share of partnership income from Eatsum because Roth and Giglio had refused to make the partnership books available. Finally Lubben made a formal demand for the books by registered mail, return receipt requested. This demand having failed, Lubben attached to his income tax return a copy of the dissolution agreement, a copy of the return receipt, and an explanation. (R. 372, 735–736, 751–752.) A further difficulty between Lubben and Giglio arose because Giglio had never paid the amount of Lubben's 1946 income tax liability resulting from Lubben's connection with Eatsum, as Giglio had agreed at the time of dissolution. (*Supra*, pp. 10–11; R. 371–372, 737, 1936.) Lubben had recouped some $17,500 of this amount by failing to pay the last few of the forty $2,500 notes payable weekly to Giglio on account of the Eatsum inventory (*supra*, p. 11; R. 865–866, 893, 1486–1487), but Giglio still owed Lubben approximately $23,000 (R. 372, 871–874).

Early in 1949, after the Government had been pressing him for some time for payment of his 1946 income taxes, Lubben, in the presence of Ronayne, Roth and Lavin, demanded that Giglio pay him the $23,000. (R. 370–372.) When Giglio refused, Lubben became angry and told him that he was going to the Treasury agents' office and "tell the whole stinking, rotten mess." (R. 374, 1067.) Lubben testified that he had been warned earlier by Giglio to stay away from the agents and to "keep my mouth shut," and that Roth had once told him that "if I ever opened my mouth I would find myself at the bottom of the Hudson River in a cement box." (R. 375, 377, 1067.) Ronayne tried to dissuade Lubben from acting hastily, but Giglio told Roth he need not worry because "Lubben will never reach the witness stand." (R. 374, 1067.)

In 1949 Lubben cooperated with the Treasury agents, turning over large quantities of records, many of them relating to the operations of Eatsum at the time he was there. (R. 346–347, 379–380, 412, 473–474.) In 1949 the agents obtained virtually all of the books of the "American" corporations, and some records of the Tavern Fruit Juice partnership, from the New Jersey receiver. (R. 1934–1937.) Later, Bozzo turned over to the agents all of the photostatic copies of working papers relating to the Eatsum partnership that he had made in 1946 just prior to their destruction. (*Supra*, p. 23; R. 1719, 1720, 1872–1873.)

In August 1950, Lubben testified extensively regarding his association with the Giglio-Livorsi interests in public hearings before the Kefauver Committee. (Hearings before the Senate Special Committee to Investigate Organized Crime in Interstate Commerce, 81st Cong., 2d Sess., Part 3, pp. 21–50.) The evidence upon which the Committee based its examination had been furnished by the Treasury agents investigating the case. (R. 97.)

10. *Reliance on ineffective*. On September 14, 1950, three informations were filed in the Southern District of New York charging that Giglio, Livorsi, Lawn and Roth had wilfully caused American Brands Corporation to fail to pay its 1946 income taxes, and that Giglio and Livorsi had wilfully failed to pay their 1946 individual income taxes. (R. 28–29.) Shortly thereafter, Lawn advised Roth that he was well acquainted with a former Department of Justice attorney who in turn was well acquainted with the United States Attorney in New York City; and that it was planned to retain him "to present our case to" the United States Attorney, "for the purpose of cancelling the information". (R. 1217–1218.) Later, Lawn told Roth that he had persuaded the then Assistant Attorney General in charge of the Tax Division, Department of Justice, to dismiss the informations, but that the United States Attorney had refused to do so because the Assistant Attorney General refused to put the instructions in writing. (R. 1237–1239.) Still later, when a New Jersey grand jury was inquiring into Lawn's personal income taxes, Lawn assured

Roth that Lawn's friend, the United States Attorney, would keep him advised as to the details of the proceedings. (R. 1074–1075.)

In 1952, before the first indictments in the instant case were returned, Roth, on the advice of counsel, offered Assistant United States Attorney Leone his cooperation in the instant case. (R. 1235, 1246, 1273–1274.) Leone refused to accept Roth's cooperation prior to the disposition of some criminal charges against him regarding alleged false statements to the R. F. C. (R. 1266.) One or two days after Roth's offer of cooperation, Giglio called him, arranged a meeting and said, "I understand that you are talking to the Government about these tax matters." When Roth answered that he was following the advice of counsel, Giglio made what Roth understood as a threat against his son. (R. 1066.)

In mid-1953, when Roth said to Giglio and Lavorsi that he wanted "to separate and have my own counsel" (R. 1218), Giglio charged that a great deal of the trouble was the result of the manner in which Roth had kept the books. Roth testified (R. 1218):

> * * * I pointed out to him in front of Mr. Lavorsi that it isn't my fault, that it is the fault of our depending on the contacts and influence of Jim Romayne in the Treasury Department to forestall any future tax examination, any fraud, any indictment, and we lulled ourselves to sleep with Howard Lawn's contact with the Department of Justice in Washington, in New York and in New Jersey, in order to prevent

any indictments; and gradually we are going on the road to ruin, because all that protection and contacts have fallen down.

B. PRE-TRIAL PROCEEDINGS

On September 14, 1950, as stated (*supra*, p. 26), three informations were filed in the Southern District of New York charging that petitioners and Roth had wilfully caused American Brands Corporation to fail to pay its 1946 income taxes, and that petitioners Giglio and Livorsi had wilfully failed to pay their 1946 individual income taxes, in violation of Section 145 (a) of the Internal Revenue Code of 1939. (R. 2763, 2764–2766, 2783–2784.)

On May 12, 1952, a formal hearing was held in Newark at Lawn's request in connection with his individual income tax. Lawn was told that "It is an administrative hearing permitting you to testify preceding a proposed criminal prosecution." (Tr. 2.) He was formally advised of his privilege against self-incrimination and warned that anything he said might be used against him in "any proceedings which the government may bring against you." (Tr. 1, *infra*.

[illegible] The transcript of this hearing was not introduced at the trial where Lawn did not raise any issue of self-incrimination. At the Court of Appeals the Government made an offer of proof. (R. 2971.) We are confident that petitioner will not dispute the existence of the facts set forth and believe they are relevant to the legal issues first raised on appeal by petitioners. [illegible] copies of the full transcript of the administrative hearing have been filed with the Clerk and a copy provided petitioner's counsel. It is to be printed in Appendix A, *infra*, p. 2a, [illegible]

p. 73.) Lawn was accompanied by counsel and placed under oath. He was told that the difficulty concerned an item of $15,000. Lawn stated that the item had been a personal loan to him from Giglio and produced a canceled check for that amount payable to him drawn on the Tavern Fruit Juice Company and signed by Livorsi. (*Infra*, p. 74.) Giglio and Livorsi were at the hearing at Lawn's request. All three, advised of their rights and under oath, discussed the check and the corresponding check stub. (Tr. 4–36.) They agreed to supply the Department of Justice with photostatic copies of the check and stub (Tr. 35) which was done three days later. (App. B, *infra*, p. 77.)

On July 7, 1952, there was served upon Roth, through his attorney, a subpoena *duces tecum* ordering him to appear before the grand jury on July 14 to testify and to produce all the books and records of nine corporations and three partnerships comprising the Giglio-Livorsi interests. (R. 2784–2786.) On July 8, 1952, similar subpoenas were served upon all of the petitioners, through their attorneys, returnable July 15. (R. 2786–2788.)

All four appeared in response to the subpoenas. Roth testified that he did not have any of the books and records called for and had not seen them for several years. (R. 2789–2795.) Livorsi testified that he had never seen any of the books and records of any of the enterprises. (R. 2795–2797.) Lawn, who had formerly been Chief of the Criminal Division of the Office of the United States Attorney for the Dis-

trict of New Jersey, produced the originals of four documents belonging to the Tavern Fruit Juice Company, a Giglio-Livorsi partnership, of which Lawn was not a member. These documents consisted of three cancelled checks, by which the partnership had paid certain sums to Lawn, and the partnership checkbook stub relating to one of these checks. One of these checks and the stub were the documents of which he had given the Government copies in May 1952. In Lawn's presence the four documents were marked Grand Jury Exhibits 1 to 4 and dated 7/15/52. (R. 2802, 2998, 3000.) Lawn asked and received permission to retain the original documents which he had produced and said that he would be glad to furnish a photostatic copy. The foreman of the grand jury suggested that the Government attorney, Jerome Leone, photostat the documents and return them to Lawn. Lawn testified that the original documents which he had produced were the only records in his possession, and that he had never seen any of the other records except some of the minute books and stock transfer books which he had seen at the time of incorporation. (R. 2798-2803.)

Giglio testified that he had not brought any of the requested records with him "only because I have not had sufficient time to look for them and gather them together" and would be "very happy to bring them in" if granted a little more time. (R. 2805.) He stated that "practically all of these companies and corporations turned over the books and records to the Internal Revenue Department on some date in

1949" (R. 2805); that he would like to have 30 days in which to locate the records remaining in his custody and would bring in everything that he could find because he had nothing to hide (R. 2806–2807); that he had not seen some of the books and records since 1947 or 1948 when some of the companies went into receivership (R. 2808–2814); and that, while he intended to produce them all before the grand jury, he "would like to make photostats of those things that [his] accountants and attorneys think they will need to defend" him with respect to the criminal informations filed against him in 1950 (R. 2814). When asked to state where the books and records were stored after they were removed from the home office of the companies, Giglio three times refused to answer, claiming his "constitutional privilege." (R. 2815.)

The Government attorney then limited his questions to the location of the books and records of the American Brands Corporation. Giglio persisted in invoking his privilege and, at his request, was excused from the grand jury room in order that he might confer with his attorney. (R. 2816.) When he returned, he continued to assert privilege with respect to the corporate books and records, repeating however that if given time, he would produce everything that he could find. (R. 2817.) After again being excused to confer with his attorney, Giglio refused to answer questions relating to the location of the records of six of the corporations on the ground that to do so would tend to incriminate or degrade him. (R. 2817–2819.)

Giglio was then taken before Judge F. Dickinson Letts, Davis,

who was informed of the pending informations by Giglio, and who directed Giglio to answer the questions. (R. 2819–2825.) Upon returning to the grand jury room, Giglio named five locations where the corporate books and records might be stored. (R. 2827–2829.) Leone advised him that it was the grand jury's wish that he produce the material in the New York area the next morning and the material in the Chicago area one week later. (R. 2831–2832.) During the following weeks, Giglio produced eighty cardboard cartons of records, including partnership records. (R. 2832–2836.)

On September 2, 1952, Giglio again appeared before the grand jury and, when asked whether he had produced all the books and records of the American Brands Corporation, he explained that he had retained some of them in reliance on his constitutional rights and that his attorney had just filed a motion to quash the subpoena in part. (R. 2835–2839.) After conferring with his attorney, the witness again admitted that he possessed certain records of the American Brands Corporation but refused on constitutional grounds to describe them. (R. 2839–2840.) Leone advised him to consult with his attorney and on the following day to respond to the subpoena to produce any and all records. (R. 2840–2842.)

The next day Giglio refused to produce the remaining records of the American Brands Corporation and was taken before Judge Weinfeld who directed him to produce them. (R. 2842–2854.) On September 4 Giglio complied with this order and also pro-

duced the "minute book of American Agar Corporation which was not required but I guess it can stay here." (R. 2855–2856.) Leone then requested him to produce the books of four other corporations still in his possession, and on the following day he produced sixteen such books. (R. 2857–2860.) He stated that, pursuant to an agreement between his attorney and Leone, he still retained certain records called for by the subpoena which "would be personal and so forth" but that "You now have all the corporations you are asked for here." (R. 2864.) No personal records were produced. (R. 48–57, 85, 87.)

On September 15, 1952, Judge Ryan quashed the subpoena as to the books and records of the three partnerships except as to those "he may have already produced." (R. 2865.)

On October 20, 1952, six indictments were returned against petitioners and Roth, charging them, *inter alia*, with the same offenses later recited in the 1953 indictment (*supra*, p. 4). On March 27, 1953, Judge Goddard (R. 2866–2871) dismissed the six indictments on the grounds that (1) it was a violation of petitioners' privilege against self-incrimination to compel them to take the stand in the grand jury proceedings since they had already been named as defendants in the pending 1950 criminal informations, and (2) it was a violation of Meglio's privilege to compel him to produce partnership records. *United States* v. *Leone*, 115 F. Supp. 674. The decision directed the Government to return the "partnership and personal records" produced by them in response to the subpoena. The Government filed a notice of appeal,

and, pursuant to a stipulation of the parties, the
turn order was stayed pending the appeal. The r
ords were subsequently impounded by the Court.
October 19, 1953, the Government's appeal was d
nissed as not timely filed. *United States* v. *Roth*, 2
F. 2d 467 (C. A. 2).

On July 23, 1953, less than two months before pro
cution of many of the substantive offenses charg
would have been barred by the statute of limitatio
a fresh indictment—the present one—was brought b
new grand jury. None of the petitioners had testifi
or produced records before this grand jury. The
after, petitioners moved to dismiss the indictment and
suppress "tainted" evidence. In this connection, th
requested inspection of the 1953 grand jury minu
and a hearing to ascertain whether any of the "tainte
1952 evidence was used directly or indirectly
obtain the new indictment. (R. 26–27.) Judge P
mieri denied these motions but ordered the return
the personal and partnership records which had be
produced by the petitioners. (R. 179–185.) *Uni
States* v. *Giglio*, 16 F. R. D. 268. Similar motions
dismiss were later denied at the trial by Judge Wal
(R. 214–247, 2505.)

SUMMARY OF ARGUMENT

I

Petitioner Lawn's principal contention is that the
at the trial of a particular photostatic copy of a ch
violated his privilege against self-incrimination.
allege that the copy used was obtained at the 1
grand jury proceeding which, he says, violated
rights.

1. Two months prior to the 1952 grand jury proceeding, a hearing was held at petitioner's request at which time he was formally advised of his constitutional rights and told that any answer he made might be used against him in pending or other criminal proceedings. Petitioner was former Chief of the Criminal Division of the United States Attorney's office in New Jersey. Questioned by his own counsel under oath, petitioner voluntarily discussed the particular check for $153000 and then provided the Government with a photostatic copy. We contend that these facts establish a waiver as to the check and all copies. Though not a part of the judicial record before this Court, the proceeding was a formal one at which, at petitioner's request, matters were put "on the record" and "in evidence", and as to the existence of which, we assume, there is no dispute.

2. Judge Goddard's dismissal of the 1952 indictment did not establish as *res judicata* or as the law of the case that the particular check here involved was privileged as to the defendant or that his privilege had been violated with respect to it. Judge Goddard held that *some* of the documents had been obtained from petitioners in violation of their constitutional rights. In fact, petitioner had no privilege against self-incrimination with respect to the particular check which was part of the partnership records of a firm of which he was not a member.

3. The failure to return the photostatic copy of the check made at the 1952 grand jury proceeding was not a violation of any court order. The original check

(and stub) were returned to petitioner at the time of the grand jury proceeding. The court orders did not call for return of copies, as requested by the defendants, but allowed the Government to retain copies for possible use against third parties as to whom no privilege had been violated. That petitioner (who had delivered only four documents to the grand jury) construed the return order in the same way is apparent from his not requesting the copies which he knew were made. Neither did he object when the photostat was introduced in evidence although it was carefully examined by counsel.

4. Exhibits 61A and 61B are a $15,000 check and corresponding stub to petitioner. It was by far the largest check to petitioner introduced at the trial and one as to which he had been questioned for years. In examining the check and stub when they were offered and then announcing "no objection," petitioner waived any privilege against self-incrimination he might still have had with respect to them, and also any objection as to why alternative copies were not used.

5. By offering in evidence one photostatic copy of the check and stub rather than another, the prosecutor committed an inadvertent mistake without the least possible prejudice to petitioner. One copy was no more or less incriminating than the other. If objection had been made, the other copy could have been offered. There was no unfairness whatever.

II

Petitioner charges that the prosecutor's statement in summation that he vouched for two witnesses, because "we think they are telling the truth," was a flagrant error which must require reversal even though no objection was made by experienced defense counsel at the time. It is hornbook law that the party who puts on a witness vouches for his credibility; this underlies the general rule that a party cannot impeach his own witness. We see no error in explaining this to the jury on summation where there is no suggestion that the prosecutor has independent knowledge as to the truth or falsity of the testimony.

Further, defense counsel had based his summation on the theory that government witnesses Lubben and Roth were lying and that the case had been started in bad faith by a previous prosecutor. He then stated that the present prosecutors "had been instructed, or in my opinion they never would have done this." The prosecutor's summation was certainly justified in response to the suggestion that he was knowingly using false witnesses, and perhaps even necessary to rebut the implication that petitioner was being deprived of his constitutional rights by the prosecution's knowing use of perjured testimony. Cf. *Mooney* v. *Holohan*, 294 U. S. 103.

III

Petitioner was accorded a full opportunity to attempt to establish that allegedly tainted evidence was being used by the prosecution at the trial. The record shows that defense counsel was never denied the chance to cross-examine where the purpose was to show the use of illegal evidence at the trial—as distinguished from its possible use before the grand jury which returned the indictment. The judge also accorded the defense other procedural safeguards to make sure that none of the allegedly tainted evidence, or evidence derived therefrom, was used at the trial.

This issue is dealt with in full as Point II of the Government's brief in the companion case, *Giglio and Livorsi* v. *United States*, No. 10, this Term, which is incorporated by reference in this brief. (Gov. Br. No. 10, pp. 19-35.)

IV

There was abundant evidence to support the verdict. Petitioner is mistaken in arguing that the jury could not rely on evidence of his conduct after the income tax returns were filed in September 1947. The conspiracy was one not only directed at failing to disclose income but also at evading the payment of taxes—a conspiracy which it was charged continued up to the date of the indictment. Neither the prosecutor nor the judge said otherwise.

Although petitioner played a smaller role in the scheme than did either Giglio or Livorsi with whom he has been convicted as a co-conspirator, there is substantial evidence both as to a course of conduct

and as to particular incidents in which petitioner played a part. He was instrumental in organizing the group of corporations which earned much of the untaxed income and then in running them through a New Jersey receivership after the funds had been taken out of them in various ways, largely by Giglio and Livorsi. The fact that petitioner did not personally have a large monetary stake in the untaxed income does not relieve him from criminal responsibility for his part in defeating the payment of over half a million dollars in income taxes in one year. We believe there was certainly sufficient evidence as to the conspiracy count, and also enough evidence to support the concurrent sentences on counts 7 and 9.

The Court of Appeals for the Second Circuit reviewed the evidence in detail and found it "conclusively establishing the guilt of these appellants".

ARGUMENT

I

EXHIBITS 61A AND 61B WERE NOT ILLEGALLY OBTAINED, WERE NOT COVERED BY THE PRETRIAL ORDERS, AND THERE WAS NO ILLEGALITY IN THEIR USE AT THE TRIAL. NO OBJECTION WAS MADE AND ANY ERROR WOULD HAVE BEEN HARMLESS

Before the 1952 grand jury petitioner Lawn produced four documents which were photostated and the originals returned. (R. 2802.) One of these was a check to petitioner for $15,000, and another was the corresponding check-stub. Indictments brought by that grand jury were dismissed by Judge Goddard on the ground that some of the evidence before it was

obtained in violation of the privilege against self-incrimination. (R. 2866–2873.) At a trial on a fresh indictment photostatic copies of the $15,000 check and stub were offered in evidence and examined by defense counsel, who announced "No objection." (R. 1022.) The foundation of petitioner's case is the claim that his constitutional rights were violated by the use at the trial of one particular photostatic copy of this check and stub—Exhibits 61A and 61B—rather than the photostatic copy to which he thought he was making no objection. We submit that this claim is without factual or legal basis.

The point which now forms the principal ground urged for reversal was first made "just before the appeal was argued in the Court below" (Br. 16). It is based on a theory analogous to newly discovered evidence and rests on assertions and factual assumptions outside the record. In effect petitioner, before the Court of Appeals, offered to show (*a*) that Exhibits 61A and 61B had been reproduced by photostatic methods on the same day that Lawn appeared before the first Grand Jury, (*b*) that they had been made from copies produced by petitioner rather than from other copies of the same documents already in the hands of the government or produced by other independent witnesses, (*c*) that petitioner had a Fifth Amendment privilege as to those documents, (*d*) that he had not waived his privilege either previous to the Grand Jury proceeding or thereafter, (*e*) that the particular photostatic copies were ones which were governed by prior orders of the court, (*f*) that their use at the trial, under the circumstances, violated

petitioner's constitutional rights, and (*g*) that the Government had available no other copies of the identical documents which could have been used at the trial had objection been made.

In the Court of Appeals the Government offered to prove that petitioner had no constitutional privilege against self-incrimination as to Exhibits 61A and 61B because those documents had been voluntarily produced months before and copies were in the Government's possession. (R. 2971.) In this Court petitioner again charges misconduct and, in an attempt to demonstrate prejudice, makes new allegations as to the "naked facts" (Br. 19, 26).

It is our view that the record, by itself, adequately demonstrates that there has been no violation of petitioner's constitutional rights and no prejudice. If, however, petitioner's present charges are not answered in full by the judicial record it is because they were not raised at the trial. In answer to his serious charges of misconduct and prejudice, this brief, in elaboration of the Government's offer of proof in the Court of Appeals, refers to facts known to petitioner Lawn which, though not in this record, we assume are undisputed.

I. IN MAY 1952 PETITIONER KNOWINGLY WAIVED ANY PRIVILEGE AS TO THIS CHECK AND STUB AND FREELY GAVE THE GOVERNMENT A COPY

On May 12, 1952, two months before the first grand jury proceeding, Lawn appeared before a formal hearing held at his request at the Federal Building in Newark. There he was specifically advised of his

constitutional rights, told that he was being permitted to "testify preceding a proposed criminal prosecution" and warned that his answers might be used against him in any proceedings which the Government might bring. (App. A, *infra*, p. 73.) Lawn, as a former Chief of the Criminal Division of the United States Attorney's office in New Jersey, was undoubtedly familiar with his rights. He was accompanied by an attorney, Edgar H. Rossbach. Petitioner freely volunteered information about the check of which Exhibit 61–A is a copy and agreed to provide the Government with photostatic copies of the check and the stub, which was done three days later.[12] Petitioner's conduct, two months prior to the first jury, was thus a full, voluntary, knowing, and formal waiver of his privilege against self-incrimination as to the check and stub.[13] It was done in a proceeding at which, at petitioner's request, matters were put "on the record" and "in evidence."

Petitioner thus is in the position of standing before this Court claiming a violation of his constitutional privilege against self-incrimination with respect to documents as to which he had long since waived his

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[12] See copy of receipt dated May 15, 1952, filed with the Clerk: Appendix B, *infra*, p. 77.

[13] The Government already had a copy of the check made from the microfilm copy kept by the bank, *i. e.*, a copy of the check prior to its perforation and indorsement by the bank. This copy was forwarded on April 17, 1952, as Exhibit 6 to Preliminary Report #2 of agents Mahon and Twohig on Howard M. Lawn. The report was sent from the New York division of the Intelligence Unit to Chief, Intelligence Division, Bureau of Internal Revenue, Washington 25, D. C.

privilege and voluntarily delivered photostatic copies to the Government. Cf. *Perlman* v. *United States*, 247 U. S. 7.

2. JUDGE GODDARD'S ORDER DISMISSING THE 1952 INDICTMENTS DOES NOT ESTABLISH THAT THE CANCELLED CHECK AND STUB WERE PRIVILEGED. PETITIONER HAD NO PRIVILEGE WITH RESPECT TO THEM BECAUSE THEY WERE THE PROPERTY OF THE TAVERN FRUIT JUICE COMPANY

Despite our view that Judge Goddard's decision dismissing the original indictments, *United States* v. *Lawn*, 115 F. Supp. 674, was erroneous, we do not propose to argue that point here nor to contend that that decision is now open for review.[13] But that decision did not hold what petitioner contends.

[13] As pointed out *supra*, p. 34, an appeal by the Government was dismissed as not timely filed.

In dismissing the 1952 indictments, Judge Goddard ruled (*a*) that it was a violation of petitioners' rights under the Fifth Amendment to compel them to take the stand in a related grand jury proceeding since petitioners had been named as defendants in the 1950 informations, and (*b*) that it was a violation of Giglio's rights to compel him to produce partnership records despite his claim of privilege (R. 2866-2871). We think the court was mistaken on the law as to the first ground and mistaken on the facts as to the second. In any event, even assuming *arguendo* that both grounds were correct or that the principle subsequently established by this Court in *Garcia* v. *United States*, 354 U. S. 118, might have furnished another ground, it would appear that the jurisdictional basis of Judge Goddard's decision was swept away by this Court's decision in *Costello* v. *United States*, 350 U. S. 359, holding that the alleged incompetency of evidence used in grand jury proceedings affords no ground for seeking a dismissal of an indictment returned by the grand jury. See also *Hale* v. *United States*, 218 U. S. 245.

The judge found that *some* of the papers produced by the defendants were obtained from them in violation of their privilege against self-incrimination—not *all* of the papers which they produced. For example, the court explicitly pointed out that among the papers which the defendants were required to produce were the books and records of the American Brands Corporation and seven other corporations, 115 F. Supp. at 676, and held that "A custodian of corporate records held in a representative capacity may be required to produce them for no privilege attaches to such records." 115 F. Supp. at 676.

The decision does not establish whether a particular document was privileged or unprivileged; whether it was a corporate paper or a personal paper; or whether it was among those documents which were properly obtained or among those which were obtained in alleged violation of the rights of one or more of the defendants. In particular, the decision did not hold that petitioner Lawn had a valid personal privilege against self-incrimination as to the cancelled $15,000 check of the Tavern partnership or that that particular document was "tainted". Nor did it retroactively re-establish a privilege previously waived. "The agents did not become trespassers *ab initio* when they took the check." *Zap* v. *United States*, 328 U. S. 624, 629. "A later trespass by the officers, if any, did not render inadmissible in evidence knowledge legally obtained." *United States* v. *Lee*, 274 U. S. 559, 563. See *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392: "Of course this does not mean that the

facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others * * *."

In any event, we believe petitioner Lawn had no privilege with respect to these documents. Before the Grand Jury in July 1952, he testified that they were documents of the Tavern Fruit Juice Company, a partnership of which he was not a member. (R. 2798, 2803.) At that time he also testified that he had obtained the documents from Giglio, one of the partners, approximately ten weeks earlier. (R. 2803.) Since the original documents were documents of a partnership of which petitioner was not a member, and since the papers were neither his personal records nor ones in his personal possession in regular course, independently of the investigation directed toward him, it seems clear that he did not have a constitutional privilege with respect to them. *United States* v. *White*, 322 U. S. 694; *see Curcio* v. *United States*, 354 U. S. 118, 122, and cases there cited. Certainly one cannot put the cloak of the Fifth Amendment around business records of other firms or persons simply by getting them into one's custody or possession.

3. NEITHER DISTRICT COURT ORDER FOR THE RETURN OF DOCUMENTS APPLIED TO COPIES MADE BY THE GOVERNMENT, NOR DO EITHER PARTY CONSTRUE THE ORDERS AS APPLYING TO THE PARTICULAR PHOTOSTATS

Following Judge Goddard's decision dismissing the original indictments the defendants submitted a draft order which would have required the Government to

return all original documents produced before the first Grand Jury and all copies which it had made. (R. 111–112.) The Judge, however, signed an order similar to one submitted by the Government (R. 80) which required only the return of original documents. (R. 2872–2873.) Before Judge Palmieri the defendants sought an order suppressing the use of all copies. (R. 26–27.) The Government at that time argued that it should be allowed to retain copies, which might legitimately be used by the Government, for example as evidence against third parties. (R. 99, 142–143, 279.) Judge Palmieri denied the motion to suppress and limited his order to the original documents. (R. 183–184.) Leaving aside the question of use, it is thus clear that the *retention* by the Government of a photostatic copy of the check and stub produced before the Grand Jury by petitioner did not violate either return order. Petitioner's repeated allegations of violation of court orders (Br. 13, 14, 18, 22, 31) are wholly unfounded. Even as to the originals, Judge Palmieri construed the return order as applying to the "illegally obtained material" (R. 184), which would not include documents as to which privilege had previously been waived. Here the originals were returned to petitioner on the day he appeared before the grand jury.

Moreover, the documents represented by Exhibits 61A and 61B, together with two other checks, were the only documents which petitioner produced before the grand jury. Under the circumstances, if Lawn did not share the Government's view that Exhibits 61A

and 61B were not covered by the return order of Judge Goddard as reinstated by Judge Palmieri, surely petitioner would have objected when those exhibits were not turned over to him after Judge Palmieri's order was issued.

Finally, the fact that petitioner shared the Government's view that Exhibits 61A and 61B were not covered by the return order is demonstrated by his failure to object to their admission in evidence even though they clearly appeared to be the photostatic copies which the Government made of the documents which he produced before the grand jury. In this connection, petitioner argues (Br. 17–18) that the telltale evidence was hidden on the back of the photostats which showed that they were made by the Government on July 15, 1952, the day on which he produced the original documents before the grand jury. But the same date was on the face. The real identifying evidence was the bold grand jury markings "G. J. Ex. 2, 7/15/52" and "G. J. Ex. 4, 7/15/52," with the initials of the foreman of the grand jury. (R. 2998, 3000). These markings were put on the original documents, of which Exhibits 61A and 61B are photostatic copies, by the grand jury in petitioner Lawn's presence at the time he produced those documents. (R. 2802.) Accordingly, the only credible explanation of Lawn's consent to the admission in evidence of Exhibits 61A and 61B is that he agreed with the Government that these exhibits were not covered by the return order.

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4. PETITIONER'S CONDUCT AT THE TRIAL WAS AN INDEPENDENT WAIVER OF ANY CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION AS TO THE CHECK OR STUB

When Exhibits 61A and 61B were offered in evidence by the Government, petitioner's counsel conducted a preliminary examination, which included a careful scrutiny of the handwriting of the various portions of the check and the stub. (R. 1021–1022.) There was only one large check to petitioner involved in the entire case and that was this check for $15,000—a check as to which petitioner had been questioned for some years. (Tr. 9–10.) Lawn and his counsel, Lloyd Paul Stryker, were not taken by surprise. If either of them had thought that petitioner had any privilege relating to the check, they decided not to assert it. Mr. Stryker announced "No objection" and the two exhibits were received in evidence. (R. 1022–1023a) Petitioner waived any privilege he might have as to a photostatic copy of those documents and also, under the best evidence rule, any objection he might have as to why the originals or some better copy were not offered instead.

There is no merit in petitioner's theory that Lawn and counsel had no reason to know what was in front of them. As stated above, the identification of the check and stub as exhibits before the 1952 grand jury appeared on the *face* of the photostats. (R. 2998.) The date, 7/15/52, was clearly marked on the side of the photostats which defense counsel was examining so carefully when questioning Roth as to the differ-

ences in handwriting appearing on the check. (R. 1021–1022.) The date on the back of the photostats, on which petitioner now places such reliance is the same as the date on the front, July 15, 1952. The fact that the photostatic print actually offered at the trial was the one made on July 15, 1952, rather than a copy later made from that print is of no significance. Either would be equally objectionable to petitioner since the *face* would show that it was a copy of a 1952 grand jury exhibit.

5. THERE WAS NO POSSIBLE UNFAIRNESS OR HARM IN USING ONE PARTICULAR COPY OF THE CHECK AND STUB RATHER THAN ANOTHER

Petitioner's argument is wholly without merit in law. It is equally without merit in equity. For the Government to offer in evidence photostatic copies of the check and stub made at the time petitioner produced them before the 1952 Grand Jury rather than other photostatic copies of the identical documents was a mistake—it was a mistake because it appeared inconsistent with the affidavits submitted by the prosecutor and his associates (*e. g.*, R. 82, 2948) and because it has led to the contentions which petitioner now raises. But it was an inadvertent mistake and the consequence of the fact that the prosecutor knew the check was admissible in evidence and not privileged. The prosecutor, apparently like petitioner and his able counsel at the trial, had never considered that one photostatic copy of the check would raise any

more question than another. But it was not a mistake that caused any injury to Lawn.

One cannot find the least possible prejudice or unfairness to petitioner in admitting in evidence exhibits 61A and 61B. The fact that the photostats were stamped on the reverse side "Jul 15 1952" made them no more prejudicial than if that stamp had not been there—these copies were no more or less incriminating than those which petitioner had voluntarily supplied the Government or those which the Government had obtained from other sources. They were no more or less incriminating than the copies to which, petitioner now says, he understood he was making no objection. If petitioner had objected to their admission, the Government could promptly have established that he had no privilege as to the check, or introduced other copies.[15]

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[15] Petitioner's suggestion that the Government may have had copies of the check in New Jersey but that they were unknown and unavailable to the Government in New York assumes a degree of clumsiness of which the Government is not guilty. In fact, the full transcript of the May, 1952 hearing at which petitioner waived his rights as to the check was in the office of the United States Attorney for the Southern District of New York by June 10, 1952. This is indicated by the date stamp on the back of one of the photostatic copies of that transcript which we have filed with the Clerk.

And we need hardly point out that when petitioner voluntarily delivered a photostatic copy of the check to the Government in New Jersey and agreed that it could be used against him "in any proceedings which the Government may bring" any privilege he had with respect to the document was gone in New York—as well as elsewhere.

II

THE PROSECUTOR DID NOT EXCEED THE BOUNDS OF PROPRIETY AND FAIRNESS

Petitioner contends (Br. 34–44) that the prosecutor "flagrantly violated" the proper standards of conduct so as to deprive petitioner of a fair trial and that "this plain and egregious error requires reversal irrespective of trial objection" (Br. 34, 42). Petitioner's distinguished and experienced trial counsel made no objection whatsoever to the prosecutor's summation. The allegations were first raised by present counsel in the Court of Appeals, which not only found them to be without merit but so unwarranted as to be subject to criticism (R. 2972):

> We are constrained to say that the presentation of this appeal was marred by a virulent attack, particularly on behalf of appellant Lawn, upon the integrity and the ethics of the prosecutor. An examination of the record shows that this was utterly unwarranted. On the contrary, he and his associates conducted the prosecution with devotion, responsibility, and rare skill against experienced and determined defense. We do not think that even the exigencies of the defendants' case justified or excused this attack. The trial was fair and the result proper, if not inevitable.

The main complaint here (Br. 35–37, 43) is that in summation the prosecutor made the following com-

ments with respect to Government witnesses Lubben and Roth (R. 2587–2588):

> I vouch for Lubben. The Government put Lubben on the stand because it thought that Lubben could be vouched for.
>
> I vouch for Roth also. * * *
>
> I vouch for them (and I will explain precisely why I do in just a moment, but I vouch for them). When I say "I", I am referring to the District Attorney's office, and I merely represent them. We vouch for them because we think they are telling the truth.

There was no objection.

The remarks of the prosecutor on their face, we submit, were unobjectionable. It is the general common law rule that the party who puts on a witness, "under familiar rules of evidence, vouches for his credibility." E. g., *Bowles* v. *Marx Hide & Tallow Co.*, 153 F. 2d 146, 147 (C. A. 6). In a case before the Second Circuit where objection had been raised "to certain expressions by the prosecutor of belief in the government's witnesses and in the guilt of the accused" that court pointed out:

> Of course this affirmation of belief merely put into words what the very fact of prosecution implied; * * * [*United States* v. *Antonelli Fireworks Co.*, 155 F. 2d 631, 637 (C. A. 2)]

To laymen jurors, who might not be aware of the considerations governing the presentation of witnesses, we see no error in the prosecutor's thus stating the law. There was no suggestion in his remarks that he was basing his conclusion on facts outside the record before the

jury or that he had independent knowledge of petitioner's guilt.

When viewed in context there can be no doubt as to the propriety of the prosecutor's remarks. The case for petitioners, as presented to the jury, pivoted upon the contention that three of the Government's principal witnesses, Roth, Lubben and Bereu, were perjurers. The core of the opening statement for the defense (R. 2901–2923) was the assertion that Lubben and Roth were unworthy of belief (R. 2911–2915); and from start to finish of his final summation to the jury (R. 2507–2585) defense counsel hammered at the theme that "* * * looking at the case any way you wish, it gets back to Lubben, Roth and Bereu" (R. 2508), and that the Government's case rested "solely" upon them (R. 2579). In addition, the defense repeatedly sought to convey to the jury, in the opening statement and in the summation, the idea that the whole case was a gigantic persecution of petitioners stemming from a group of internal revenue agents led by Special Agent James J. Twohig (R. 2903–2912, 2917–2919, 2521, 2531–2537, 2557, 2566), and Twohig was accused of procuring the testimony of Lubben, Roth and Bereu, though aware that they were utterly unreliable (R. 2514–2515, 2517–2520, 2532–2534, 2535–2536). Moreover, Assistant United States Attorney Leone, who obtained the original indictment in 1952, was accused of cooperating with Special Agent Twohig to institute the proceedings in bad faith. (R. 2904–2908.) At the outset the defense expressed gratitude that the jury, and not the agents, would

decide the facts (R. 2908); in conclusion the jury was urged that "This is no case for Internal Revenue Agents to decide" (R. 2583); and petitioners were referred to as "these victims of Lubben and Leone" (R. 2915).

Defense counsel took pains, however, to make it clear that his accusations did not apply to the incumbent United States Attorney or his staff. He pointed out to the jury that Leone had resigned shortly after Judge Lumbard became United States Attorney and went on to say (R. 2904, 2905):

> * * * And what I am about to say, what I will prove Mr. Leone's actions were, I want to make as clear and positive as I can, is in no wise a reflection of any kind on Judge Lumbard, whom I greatly respect and admire, nor is it a reflection on these gentlemen here who are prosecuting this case. *They are not responsible for it at all;* they just inherited what was done, and they had a job to do and that was their job, and it is all right.
>
> * * * * *
>
> * * * Again I am not referring at all to Mr. Wessel [the prosecutor] or Judge Lumbard or his office. *They had been instructed, or in my opinion they never would have done this.* [Emphasis supplied.]

Clearly this could not go unanswered. When the defense in one breath charged that the prosecution had been instituted in bad faith in knowing reliance upon untrustworthy witnesses, and in the next asserted that the present prosecutor was "instructed" or "never would have done this," there was only one possible

answer, *i. e.*, that the United States Attorney and his staff fully believed that Roth and Lubben were now telling the truth or they would not otherwise have proceeded with the trial.[16]

Thus, in context, the prosecutor's expression of confidence in the Government's witnesses was amply justified. Remarks that might be considered as improper when standing alone acquire a new cast when viewed with reference to matters raised by opposing counsel's arguments. *Schino* v. *United States*, 209 F. 2d 67 (C. A. 9), certiorari denied, 347 U. S. 937; *Springer* v. *United States* 148 F. 2d 411, 414 (C. A. 9). Moreover, as we have indicated, petitioners' counsel made no objection to the argument. The proper time to object to a prosecutor's remarks is when they are made, so that the alleged error can, if possible, be corrected. *Crumpton* v. *United States*, 138 U. S. 361, 364; *Kreinbring* v. *United States*, 216 F. 2d 671, 673 (C. A. 8); *United States* v. *Kortepeter*, 114 F. 2d 124, 128 (C. A. 7), certiorari denied, 311 U. S. 711; *Jarvis* v. *United States*, 90 F. 2d 243, 246 (C. A. 1); *Mendelson* v. *United States*, 58 F. 2d 532 (C. A. D. C.); *McIntosh* v. *United States*, 1 F. 2d 427, 429 (C. A. 7).

A prosecutor may express his individual belief in

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[16] The trial judge, at time of sentencing, indicated that he, too, had believed the witnesses (R. 2740):

> I heard the cross-examination of Lubben and Roth, both of whom impressed me as telling the truth. They are people who got into your [petitioners'] toils and then tried to work their way out, and they suffered the tortures of the damned.

Roth did not, as petitioner asserts (Br. 35), admit lying on the trial of this case (R. 1261–1262).

the guilt of an accused if it is based solely on the evidence adduced, and the jury is not led to believe there is other evidence, known to the prosecutor but not introduced, justifying that belief. Cf. *Henderson* v. *United States*, 218 F. 2d 14, 19 (C. A. 6); *United States* v. *Holt*, 108 F. 2d 365, 370 (C. A. 7), certiorari denied, 309 U. S. 672; *Tuckerman* v. *United States*, 291 Fed. 958, 969 (C. A. 6), certiorari denied, 263 U. S. 716. *Berger* v. *United States*, 295 U. S. 78, cited by petitioner, involved a situation where the prosecutor referred to matters outside the record.

The remarks of the prosecutor here were not only proper in themselves under the cases cited above, but were justified as responsive to the unwarranted charge by counsel that the prosecution was so intent upon obtaining a conviction that it was willing to disregard the unrealiability of its witnesses. Cf. *Gridley* v. *United States*, 44 F. 2d 716, 739 (C. A. 6), certiorari denied, 283 U. S. 827; *United States* v. *Battiato*, 204 F. 2d 717 (C. A. 7). The remarks may even have been a necessary precaution to avoid appearing to accept a charge which would have meant petitioner was being deprived of his constitutional rights. Cf. *Mooney* v. *Holohan*, 294 U. S. 103.

Any possible prejudice from the prosecutor's responsive remarks, indicating that he believed the witnesses were telling the truth, was corrected by the judge's charge to the jury, telling them that they were the only ones to determine credibility of witnesses. The judge devoted three pages to this point (R. 2684–2686) and called particular attention to the fact that Roth was an accomplice and that "you have got to be

particularly careful in scrutinizing his testimony to see whether to save his own skin he lied to hurt somebody else or whether he had some other motive for lying to hurt somebody else." (R. 2686.) And as to Lubben the judge charged: "* * * I am going to tell you to be just as careful with his testimony as you would with an accomplice, and look and scrutinize it carefully." (R. 2686.)

Petitioner's other complaints relating to the prosecutor's conduct are also without substance. These points relate to statements made by the prosecutor (*a*) in the course of his summation to the jury, and (*b*) during the trial.[17]

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[17] Petitioner levels another attack (Br 40) on the witness Lubben, contending that he "refused to answer questions on cross-examination" and that his "answers were utterly unresponsive". With respect to this it should be noted that several days after Lubben left the witness stand, the trial judge, without the presence of the jury, made the following statement to defense counsel (R. 1684–1685):

> * * * incidentally, your comment about 17 pages to get an answer from Mr. Lubben, I don't want my failure to take issue with you to indicate that I agree with you.
>
> I think that some of your questions were not simple, as you would suggest; that there were, I don't say with deliberate intent, but nevertheless, there were distortions of what the witness thought the facts were, and Mr. Lubben, to say the least, is cross-examination shy, having been cross-examined in goodness knows how many proceedings, as to his previous testimony, and he was a person who was not going to give a yes or no without having the question in exactly the form he thought he could say yes or no to.
>
> I think if there was any mistaken judgment it was perhaps mine in letting you insist on a yes or no answer to some of the questions, and I have, since the experience with Lubben, been less insistent on such answers.
>
> I just think that we lost a lot of time in the examination of Lubben insisting on a yes or no when in substance the question had been answered.

(*a*) As we have pointed out, there was no objection whatever to the summation, and petitioner is in no position now to urge that there was error. Moreover, it seems to us that petitioner improperly characterizes the summation. We find nothing there suggesting that Lawn should be convicted "because of the personal characteristics which the prosecutor chose to attribute to Lawn" (Br. 38); or relating to "collateral crimes not material or established by the evidence", or physical threats by Lawn (Br. 39); or otherwise departing from the record or improperly characterizing the evidence.

(*b*) It is natural enough that in the course of a six weeks trial the prosecutor may have made several comments which displeased the defense. The contentions with respect to these are (1) that the prosecutor expressed the opinion that Lawn would probably "intimidate or tamper with the witness Roth * * * and * * * would improperly approach another Government witness" (Br. 39); and (2) that the prosecutor stated "I would like to see the Tavern and Eatsum books" (Br. 40). The record supports only the latter contention. But it can hardly be said that by this comment during a colloquy with the judge (which chief defense counsel did not even hear until advised of it by a colleague (R. 2410)) the prosecutor "dramatically informed the jury that defendants had not produced the partnership books" (Br. 40).

Defense counsel was seeking to introduce in evidence expert testimony, based on an analysis of financial records, which assumed that obligations of Tavern and Eatsum were worthless. The prosecutor objected

on the ground that there was no adequate foundation as "Those books are not in evidence." (R. 2407.)

The remark now criticized was in response to defense counsel's renewed effort to introduce conclusory testimony without proper foundation. The Government's objection was sustained. (R. 2410.) A reading of this part of the record will demonstrate that there was no error. Further, the jury was well aware that some, but not all, of these partnerships' papers had been put in evidence in a piece-meal fashion by the defense. (*E. g.*, R. 738–743, 769, 773, 787–790, 796–797, 811–812, 1048–1049.) There was no suggestion that the reason they were not in evidence was the privilege against self-incrimination. Finally, petitioner fails to indicate how comment as to the books (of which he was not custodian) of a partnership of which he was not a member "invaded Lawn's constitutional privilege" (Br. 40).

We submit that the argument that the prosecutor was guilty of misconduct is without merit, and that the Court of Appeals was justified in condemning it as "utterly unwarranted." (R. 2972.)

III

PETITIONER WAS ACCORDED FULL AND ADEQUATE OPPORTUNITY FOR CROSS EXAMINATION AND OTHER SAFEGUARDS AGAINST THE USE OF ALLEGEDLY TAINTED EVIDENCE AT THE TRIAL

As his third argument (Br. 44–48) petitioner Lawn contends that he was denied due process by the alleged failure of the district court to provide him an opportunity to determine whether there was use at the

trial of illegal evidence or leads based on such evidence. This issue is one of the principal contentions raised by petitioners Giglio and Livorsi in No. 10, this Term, to be argued immediately following this case. We deal with the issue fully as Point II of our brief filed in that case (Gov. Br. No. 10, pp. 13-35) to which the Court is respectively referred. All three petitioners, Lawn, Giglio and Livorsi, were represented by the same counsel at the trial and the issue is whether he was there given adequate opportunity to determine whether any of the evidence used at the trial had been illegally obtained from the petitioners. We submit that the record shows that he was given every opportunity for cross examination for that purpose and that petitioners were accorded other safeguards as well to the same end.

Petitioner Lawn's position appears to differ from that of his co-defendants.

Petitioners Giglio and Livorsi also claim that they should have been given an opportunity to explore what evidence was before the grand jury which brought the indictments here involved. We read petitioner Lawn's brief as limiting his claim as the right to—

> * * * a hearing or the right to cross-examine Government witnesses on the uses made by the prosecutor *on the trial* of evidence unconstitutionally and illegally obtained * * *. [Br. 41, emphasis supplied.]

We believe Lawn is legally sound in so limiting his argument, and—going further—are in general agree-

ment that under the circumstances he had a right to cross-examine for the purpose of discovering the sources of the evidence used *at the trial*. Our position, as elaborated in Point II of the brief in No. 10, is that that right was accorded him.

Should we be mistaken in construing Lawn's position, and if, in fact, he too claims the right to "go fishing" as to the evidence before the grand jury, we respectfully refer the Court to Point I of the Government's brief in No. 10, this Term, where we deal with that contention by Giglio and Livorsi. (Gov. Br. No. 10, pp. 11–19.) Our position as to that argument is, in sum, (1) that a defendant has no right to go behind an indictment valid on its face, of a legally constituted and unbiased grand jury, to determine the sufficiency or propriety of the evidence upon which it acted, *Holt* v. *United States*, 218 U. S. 245; *Costello* v. *United States*, 350 U. S. 359; and (2) that even if in some circumstances there might be such a right, both lower courts found that the claim that this grand jury considered "tainted" evidence had no such solidity as to justify going behind the indictment in this case.

IV

THERE WAS ABUNDANT EVIDENCE TO SUPPORT THE VERDICT

Finally, petitioner contends (Br. 48–78) that the evidence was insufficient to establish his guilt on each of the three counts (Nos. 7, 9 and 10; R. 14–21). So related

he was convicted.[18] He supports that contention by ignoring much of the evidence[19] and by reaching factual conclusions which were apparently not shared by the jury. The trial judge sentenced petitioner to one year rather than the fifteen years given Giglio and Livorsi in recognition of the *smaller role* he played, but found no shortage of evidence. (R. 2927.) The Court of Appeals reviewed the evidence in detail and found it "conclusively establishing the guilt of these appellants". (R. 2968.) We share that view.

Underlying petitioner's argument is his assertion that no evidence of events after the middle of September 1947 can be considered. Petitioner states (Br. 67, 69):

> * * * the conspiracy to conceal necessarily ended also with the filing of the tax returns (R. 2716, 2718) and the prosecutor so conceded (R. 2890).
>
> * * * * *

---

[18] Petitioner makes two arguments which we do not consider require answer. He argues that when the judge declared a mistrial as to the American Brands Corporation as to count 10 (because the jury failed to return any verdict) and dismissed that portion of the indictment (R. 2747) this amounted to adjudication of innocence of American Brands of count 9 and that that required the acquittal of petitioner on count 10. (Br. 48-49.) He also argues that, under Section 145 (b), the only way to evade a tax is to file a false return; that an organized conspiracy to avoid payment of taxes by filing late returns, taking money out of the corporations and putting them through receivership is not a crime. (Br. 50-54.) We think neither point has any merit.

[19] For example, his schedule of "testimony" (Br. 80) does not include the documentary evidence or exhibits before the jury.

> To be connected with the conspiracy, any such alleged concealment through the New Jersey receivership would have to antedate September 12–15, 1947, when the returns were filed. The Judge so charged (R. 2717, 2718).

These statements as to a concession by the prosecutor and a charge by the trial judge are erroneous. The prosecutor, in his opening statement (R. 2890) said that the conspiracy "culminated", *i. e.*, reached its highest point, in the middle of September, 1947. This is hardly a concession that it terminated at that time. At the cited reference (R. 2717; emphasis added), the judge charged the jury: "Now we come to count 9, which is that from on or about the 1st day of January 1946, *up to the date of the filing of this indictment* * * *" Giglio, Livorsi, Lawn and Roth attempted to evade the payment of taxes owing by American Brands. The charge that concealment must have prevented the collection of the tax "when it was due" (R. 2718) is hardly an instruction that the jury must ignore all concealment after the day on which the returns were filed.

On the conspiracy count (count 10) the evidence appears overwhelming. In mid-1945, when David Lubben became associated with the Giglio-Livorsi enterprises, Giglio advised Lubben that Lawn (R. 329):

> was a former United States District Attorney, and that he had a terrific entry with some of the highest government offices and that he was a part of the organization, and that he [Giglio] felt that Mr. Lawn was there to prevent any trouble.

The record shows that Lawn was a man of some degree of influence both within and without the Giglio-Livorsi organization. Before Giglio would approve going ahead with the black market corn syrup arrangements (*supra*, pp. 8–9) he stated that he would "check it with" Lawn. (R. 318.) Soon thereafter, Giglio told Lubben that he should no longer concern himself with buying the corn because Lawn "had much better connections and that he would take care of it". (R. 333.) Lawn verified this, and told Lubben that he had "terrific connections" in the West, and could arrange to buy the black-market corn "better and cheaper and faster". (R. 333, 1092.) When Lubben had discussions in Giglio's office (which was next door to Lawn's), Lawn would frequently be present. (R. 327, 329.) It was Lubben's recollection that Lawn was present at the important conference in the fall of 1945, at which Giglio suggested a bold and large-scale tax evasion plan. Giglio stated that the profits of the Eatsum partnership were becoming so large that "something had to be done, and done quick" because Giglio was not "interested in paying a lot of income tax". (*Supra*, pp. 9–10; R. 367.) Giglio said that it had been decided to form a number of corporations to syphon off the profits of Eatsum by means of false invoices;[20] and that after a few months of existence these corporations would be dissolved before

[20] It appears that this part of this scheme (transferring profits from the partnership to the new corporations by means of false invoices) was not carried into effect. Similarly, Lubben refused to indorse a group of checks presented to him by Giglio, who explained: "We just want to get some of this money out of Eatsum Food Products." (R. 369–370.)

it came time to pay the income tax, so that they would not have to pay it. (*Supra*, p. 10; R. 367–368.)

Lawn, as legal adviser, was "instrumental" in organizing the various "American" corporations early in 1946. (R. 1124–1125.) Although Lawn owned only a nominal interest in American Brands Corporation, he was made its vice-president. He was also vice-president of American Agar Corporation, in which he received a 25% interest for his services. (*Supra*, p. 12; R. 1915.)[21] Lawn, in addition to his stock, received substantial cash compensation for his services, including $18,000 from American Brands Corporation in 1946 and $10,196.87 in 1947. (R. 1917; Schedule G to Govt. Ex. 88, of unprinted record.) Though Lawn was not a member of either the Tavern or the Eatsum partnership, he drew a salary of either $250 or $350 per week from Tavern. (R. 1023.) No income tax was withheld on any of these salaries or other drawings. (R. 1183, 1922–1923.) Lawn received a special $15,000 check from Tavern late in 1945—(Govt. Exs. 61–A and 61–B, R. 2998–3001), from which no tax was deducted although it was recorded on the books as a legal expense, and so appeared on a partnership financial statement prepared several months later. (R. 1020.) Later, when Lawn

[21] The corporate records available to the Government did not disclose the names of the officers of the other three "American" corporations. (R. 1915.)

was about to file his income tax return, the records were altered. (R. 1019.)[22]

When Giglio became interested in putting some of the money into a home in northern New Jersey in 1946, Lawn introduced him to the realtor who soon thereafter sold Giglio the $100,000 estate of Senator Barbour. (*Supra,* p. 19.) Lawn was present with Giglio and Livorsi when they persuaded Mike Jacobs, the boxing promoter, to sell Livorsi his estate for $50,000, shortly after Livorsi had offered Jacobs $85,000 for the property. (*Supra,* p. 20.)

Lawn's authority was such that he requested Roth to prepare a false financial statement for American Brands Corporation in the spring of 1946, for the purpose of securing a credit rating from Dun and Bradstreet. Roth complied, and arbitrarily selected figures of $1,000,000 of capital and $500,000 of surplus. (R. 1123–1124, 1130.) Lawn then submitted the statement to Dun and Bradstreet. (R. 1122–1124.)

There was direct proof that Lawn knew the corporate income tax return for 1946 was being filed late, for he signed the request for an extension of time in which to file. (R. 1144–1145.) Several days before the returns were eventually filed, in September, 1947, it was Lawn who was instrumental in helping to conceal Giglio's assets. (*Supra,* pp. 20–21.) Giglio, in Lawn's presence, offered to "sell" his "$100,000 home to

[22] Petitioner's statement (Br. 25) that "The sole testimony was that the $15,000 was a loan * * *" seems less than candid. (R. 1018–1020, 1886–1887, Ex. 58A.) Giglio did not list such a loan among his assets when he went into bankruptcy. (R. 2279–2280.)

Roth, so that Giglio would "have a roof over my head in case the Government assesses me and will not be able to take the house * * *". (*Supra*, p. 20; R. 1220.) Lawn "agreed that it would save Mr. Giglio's home" and said he would have a New Jersey lawyer acquaintance draw up the papers. (R. 1220.) The closing took place in Lawn's office, the papers having been drawn up by Lawn's friend, one Tepper, who handled the closing. Although Tepper did not represent Roth, Roth gave him a check for $200 at Lawn's suggestion in order "to make it look good". (*Supra*, p. 21; R. 1220, 1222.)

Early in December, 1947, several months after the liquidation of the corporate and personal assets of Giglio and Livorsi was virtually complete (*Supra*, pp. 19–21), Lawn, Giglio and Roth discussed the relative merits of receivership and bankruptcy. Lawn suggested that it would be more advantageous to go into receivership in New Jersey. Such proceedings were commenced against American Brands and the related corporations with the filing of a creditor's complaint for about $3,500. (*Supra*, p. 21.) During the receivership proceedings, Roth gave extensive false testimony by pre-arrangement with Giglio and Lawn. (*Supra*, p. 22.)

It was after the filing of criminal informations against petitioners and Roth in 1950 that Lawn's primary value to the conspiracy was put to the test. It will be recalled that Giglio told Lubben in 1945 that Lawn "was there to prevent any trouble" through his connections with "some of the highest government

offices". (*Supra*, p. 8.) Shortly after the informations were filed, Lawn advised Roth that he was well acquainted with an Indiana politician (a former Department of Justice attorney) who in turn was well acquainted with the United States Attorney in New York City; and that it was planned to retain him to try to persuade the United States Attorney to dismiss the informations. (*Supra*, p. 26.) This effort apparently failed. Later, Lawn explained to Roth that the local United States Attorney could be overruled by the Department of Justice in Washington. Lawn proposed to fly to Washington to seek the intervention of an Assistant Attorney General. Later, Lawn told Roth that he had prevailed upon that official; that the Assistant Attorney General had been "very much annoyed that a former Department of Justice man" should have an information filed against him, because "it just isn't done"; that the Assistant Attorney General had telephoned the United States Attorney and asked him to "cancel the information"; that after a heated conversation the latter official refused to comply without written orders to "cancel it"; and that such written orders were never sent. (R. 1237–1239.)

In 1952, when a federal grand jury in New Jersey was inquiring into Lawn's personal income taxes, Lawn asked Roth (who had been subpoenaed to testify) for his version of the handling on the books of the $15,000 check Lawn had received from the Tavern partnership in 1945. (R. 1074–1075.) When Roth

gave his recollection of the matter, Lawn became vehement, told Roth that he was all wrong "and that the manner in which I am explaining it to him will positively put him in jail". (R. 1075.) One or two days after Roth had testified, Lawn asked him what he had testified to. When Roth said he just wanted to forget the whole thing, Lawn replied that it made no difference because the United States Attorney in New Jersey was a friend of his, and "I will know what was done and what was said". (R. 1075.)

When the conspiracy began to fall apart in mid-1953, Roth ruefully told Giglio (*supra*, pp. 27–28; R. 1218–1219):

> I pointed out to him in front of Mr. Livorsi that it isn't my fault, that it is the fault of our depending on the contacts and influence of Jim Ronayne in the Treasury Department to forestall any future tax examination, any fraud, any indictment, and we lulled ourselves to sleep with Howard Lawn's contact with the Department of Justice in Washington, in New York and in New Jersey, in order to prevent any indictments; and gradually we are going on the road to ruin, because all that protection and contacts have fallen down.

We submit that the facts reviewed above constitute substantial evidence which warranted the jury's inference that Lawn was not the innocent bystander he now professes to be, but that he was an active and important member of the conspiracy.

Since petitioner's sentence of a year and a day was imposed on each count to run concurrently, the Court should not find it necessary to consider the evidence as to the other counts. *Hirabayashi* v. *United States*, 320 U. S. 81, 85, 105; *Pinkerton* v. *United States*, 328 U. S. 640, 641–642. Examination, however, will show that as to counts 7 and 9 there was also an unquestionable basis for the jury's verdict. In particular, Lawn's participation in the concealment of Giglio's assets (count 7) is established by his arranging the transfer of Giglio's $100,000 home to Roth so that the government "will not be able to take the house." (R. 1220.) The surrounding circumstances of cashing a predated check and making the payment for Giglio's equity in currency, all bills of one hundred dollar denomination or less, support the purpose of the transfer. (R. 1219–1234.) Lawn participated in the misappropriation, conversion and diversion of corporate assets to evade the taxes of American Brand Corporation (Count 9). Lawn suggested the New Jersey receiverships (R. 1245), and was present at the meeting at which falsified ledger sheets were submitted and a plan agreed upon whereby the loans due the corporations from petitioners were to be wiped out as corporate assets. (R. 1175–1177.) Throughout 1947, before and after the taxes were due, Lawn and Lawn International drew substantial amounts out

of the corporations in the conspiracy. (R. 1917, 1922–1923.)

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted.

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SEPTEMBER 1957.

APPENDIX A

(Excerpts from the transcript of the hearing of May 12, 1952)

IN THE MATTER OF THE INCOME TAX PROCEEDINGS AGAINST HOWARD LAWN

Hearing, held on May 12, 1952, at the Federal Building, Newark, New Jersey, requested by Mr. Lawn.

Appearances:

John Lockley, Special Assistant to the Attorney General
Charles J. Tyne, Assistant United States Attorney
Stanley E. Rutkowski, Assistant United States Attorney
S. Whitman Cordes, Special Agent, Treasury Department
Paul Mahon, Special Agent, Treasury Department
James Twohig, Special Agent, Treasury Department
Edgar H. Rossbach, Esquire
Howard Lawn
William Giglio
Frank Lavarsi [*sic* throughout]

Mr. LOCKLEY. Again, for the record, I would again like to advise you of your Constitutional rights. You may refuse to answer any and all questions that you believe may incriminate you. If you do so elect to

answer any questions put to you, they may subsequently be used against you in any proceedings which the government may bring against you.

Mr. LAWN. I understand.

(Mr. Giglio and Mr. Lavarsi were also made aware of their rights in the same manner as above.)

Mr. LAWN. I assume that it would apply to anyone in this room.

Mr. GIGLIO. Will you please put that in the record?

Mr. LOCKLEY. Certainly.

Will one of you gentlemen administer the oath? I presume all three intend to testify.

Mr. TWOHIG. You have been advised of your Constitutional rights by Mr. Lockley, and I am authorized to take testimony. The statements you will give will be made under oath.

(Mr. Twohig administered the oath to Mr. Lawn.)

Mr. GIGLIO. We do.

Mr. TWOHIG. Mr. Giglio, please repeat the oath after me.

(Mr. Twohig administered the oath to Mr. Giglio. Mr. Twohig administered the oath to Mr. Lavarsi.)

Mr. TWOHIG. The remarks apply to you that I made to Mr. Lawn and Mr. Giglio.

Mr. LAWN. Do you intend to testify, too, Mr. Twohig?

Mr. LOCKLEY. I do not anticipate having anyone testify. It is an administrative hearing permitting you to testify preceding a proposed criminal prosecution.

The Commissioner of Internal Revenue has referred your case to the Department of Justice for prosecution for the year 1945 by filing a false return in the District of New Jersey. Specifically, it is alleged that that return is false, in that you failed to include an item of $15,000 which the Treasury De-

partment asserts is taxable income to you, and we are here to listen to the true nature of the charge. [pp. 1–2]

* * * * *

Mr. ROSSBACH. May I ask this question? Is the particular item of $15,000 represented by a check dated November 7, 1945? Is this what we are talking about?

Mr. LOCKLEY. Yes. [p. 3]

* * * * *

Mr. ROSSBACH. Mr. Lawn, your attention has been drawn to an item of $15,000 which was paid to you made out by a check made payable to you dated Wednesday, November 7, 1945, drawn on the account of Tavern Fruit Juice Company, 360 Troutman Street, and signed by the signature purporting to be Frank Lavarsi. Very directly, was that amount of money paid to you for anything representing income which would be taxable?

Mr. LAWN. Emphatically, no.

Mr. ROSSBACH. What does it represent?

Mr. LAWN. It was a loan made to me by Mr. Giglio paid in a check, which check I deposited in my account, and the check you hold in your hand so indicated on the back. [p. 4]

* * * * *

Mr. LAWN. Let me explain. I asked Mr. Giglio to loan me $15,000. He did. He gave me a check that is in evidence now * * *. [p. 7]

* * * * *

Mr. LAWN. To the best of my recollection, there was a reference to a $15,000 item at that [Kefauver Committee] hearing, and to the best of my recollection, not having had that specifically identified to me at that time, I inferred they must be thinking of this check

and I said that if they were talking of this check, it was a loan. [p. 10]

* * * * *

Mr. LAWN. * * * I want to talk about this check, Ed. [p. 25]

* * * * *

Mr. ROSSBACH. Will you refer to this set of check stubs. Will you describe them.

Mr. GIGLIO. This is the check stub from the check book this check was issued on. * * *. [p. 26]

* * * * *

Mr. LOCKLEY. For the record, I might describe this stub as being three check stubs which has been taken from a loose-ring binder type of check book. The top of the stub bears check number 638 dated November 5, 1945 in a red pencil stamp, drawn to the order of Halloway Corporation on account for sugar, for $2000. Check number 639 was, with a rubber stamp in red, dated November 5, 1945 to the order of Stein-Hall, Incorporated, 15 drums of agaset, $3590, and the last stub is for check number 640 drawn to Mr. Howard Lawn for $15,000 with a rubber stamp in red ink dated November 7, 1945 and written in parenthesis Bill G. Do you know how that stub was carried forward to the books of the company? [p. 35]

* * * * *

Mr. LOCKLEY. I just want the record to show that Mr. Lawn, Mr. Giglio and Mr. Lavarsi have appeared voluntarily at their own request or at the request of Mr. Lawn. No inducements or threats have been made. Is that correct, gentlemen?

Answer by all three: Absolutely correct.

Mr. LOCKLEY. The record should also show the taxpayer, Mr. Lawn, has been offered a copy of the tran-

script of this record at such time as it is completed.

(Short discussion off the record.)

Mr. ROSSBACH. We will supply you, as an Assistant Attorney General——

Mr. LOCKLEY. I am just a Special Assistant.

Mr. ROSSBACH. —and the Department of Justice with photostatic copies of these exhibits that we have referred to today. If there is something more the Department of Justice wants, we will be glad to supply that to them, too. [p. 55]

* * * * *

APPENDIX B

(Receipt for the photostat of check and stub)

MAY 15, 1952.

Received from Edgar H. Rossbach, Esquire, the following photostatic copies:

Check No. 640 dated Wednesday, Nov. 7, 1945, to the order of Howard M. Lawn, signed by Frank Lavarsi [*sic*], in the sum of $15,000.00.

Check No. 298 dated May 10, 1949, to the order of Margherita Giglio, signed by Howard M. Lawn, in the sum of $2,000.00.

Check No. 226 dated May 3, 1949, to the order of "Cash", signed by Howard M. Lawn, in the sum of $500.00.

Three continuous check-book stubs for checks consecutively numbered 638, 639, and 640 for respective amounts of $2,000.00, $3,000.00, and $15,000.00.

1946 Partnership Return of Income for fiscal year beginning April 16, 1945 and ending March 31, 1946, for Tavern Fruit Juice Company, 360 Troutman Street, Brooklyn, New York.

/s/ GROVER C. RICHMAN, JR.
GROVER C. RICHMAN, JR.
United States Attorney.

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SUPREME COURT, U

IN THE

Supreme Court of the United States

October Term 1957

No. 9

HOWARD LAWN,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

NOTICE OF MOTION, AFFIDAVIT AND BRIEF IN SUPPORT OF MOTION TO STRIKE.

MILTON POLLACK,
Counsel for Petitioner, Howard Lawn,
111 Broadway,
New York 6, N. Y.
Tel. WOrth 4-5770

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IN THE

Supreme Court of the United States

October Term 1957

No. 9

HOWARD LAWN,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

MOTION TO STRIKE NON-RECORD EVIDENCE AND ARGUMENT BASED THEREON IN THE GOVERNMENT'S BRIEF.

Petitioner, Howard Lawn, whose petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit was granted on October 15, 1956, 352 U. S. 865 (1956) moves this Court for an order

a) striking from the Court's files and from the respondent's brief the non-record evidence supplied informally by respondent on or about September 30, 1957, and

b) striking from respondent's brief all argument based on such newly supplied non-record matter, and

(c) directing the respondent to file a corrected brief omitting said improper inclusions, references and arguments based upon said matters not-of-record in this case.

The petitioner further moves that the respondent be required to submit its brief and papers in opposition on or before October 7, 1957, and moves further that this motion be distributed to the Court within five (5) days from the date of filing hereof. The affidavit of Milton Pollack, counsel for petitioner Lawn, in support of this motion is annexed hereto.

Dated: New York, October 1, 1957.

MILTON POLLACK,
Counsel for Petitioner, Howard Lawn,
111 Broadway,
New York 6, N. Y.
Tel. No. WO 4-5770.

AFFIDAVIT OF MILTON POLLACK.

IN THE

Supreme Court of the United States

HOWARD LAWN,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

MILTON POLLACK, being duly sworn, deposes and says:

I am counsel for petitioner Lawn. Certiorari herein was granted on October 15, 1956, 352 U. S. 865 (1956).

This case is expected to be reached for argument on October 15, 1957.

I was retained in this matter in January 1956 and my knowledge and conduct of this matter are based on the record and proceedings had in the lower courts as shown by the record certified to this Court.

The respondent, in a sudden move made on or about September 30, 1957, has undertaken to file in this case with the Clerk of this Court, ten (10) copies of matter which respondent concedes is non-record "evidence". Then on the basis of this ex parte procedure and hearsay material, respondent has made an extensive argument in its brief to this Court filed on September 30, 1957. This argument is documented to such improper matter as well as other improper material described below. The "evidence" so utilized was not in any sense newly-discovered by the Government, nor does the Government so contend.

It is respectfully submitted that respondent's procedure is improper and not legally permissible and in violation of all rules and principles of appellate practice and the practice in this Court; and is distinctly unfair and prejudicial to the petitioner.

The respondent undertook on or about September 30, 1957 to file in this case, ten (10) copies of a claimed transcript of a so-called administrative hearing alleged to have been held 5½ years ago on May 12, 1952, in New Jersey. The respondent then set forth as an Appendix A and B, to respondent's brief on this appeal, alleged excerpts from said alleged transcript dated May 12, 1952 together with an alleged receipt dated May 15, 1952.

The respondent acknowledges in its brief at footnote 11 on page 28, that "The transcript of this hearing was *not introduced at the trial*" * * *. Respondent then observes that "We are confident that petitioner will not dispute the existence of the facts here set forth and believe they are relevant * * *" (Br. 28).

Again, on page 35 of respondent's brief herein the respondent identifies and makes reference to this newly supplied material and concedes that it is "not a part of the judicial record before this court" * * * etc.

Again, on page 41 of respondent's brief it states

> "In answer to his (petitioner's) serious charges of misconduct and prejudice *this brief*, in elaboration of the Government's offer of proof in the Court of Appeals, *refers to facts* known to petitioner Lawn which, though *not in this record*, we assume are undisputed." (Emphasis added.)

The petitioner seriously disputes both the accuracy of the alleged transcript and the accuracy of the alleged facts which the Government now wishes to "assume" on the basis of the new non-record "evidence."

The respondent aggravates the situation further in footnote 13 on page 42 of its brief by supplying further non-

record information, viz., that the Government had allegedly obtained a microfilm copy of the check in question from a bank, that it had forwarded the same to itself in Washington as an exhibit to a preliminary report of named revenue agents and that the report was sent from New York Intelligence to Washington Intelligence of the Internal Revenue Bureau. None of this supplied, hearsay and otherwise inadmissible information appears anywhere in the voluminous record of the proceedings had in this case in the courts below.

Months were spent in settling the record on the appeal herein and the new matter now brought forth on the verge of argument plainly was intended as a surprise move with which to influence the decision of this Court by matters which the Government must have known could not be taken into consideration.

Obviously, the attempt now to supply hearsay, unsworn non-record information and "evidence," not presented in the Courts below denies the rights of confrontation and cross-examination and impairs all constitutional guaranties by which to test the integrity and trustworthiness of the material, and seeks to preclude appropriate and timely inquiry into its origin, its accuracy, its probative force and its admissibility.

The proceedings and brief of the respondent are entirely irregular.

There is a regular procedure prescribed in the Supreme Court Rules for the inclusion of any material omitted from the printed record by error, or accident, or misstatement Rule 36(6). Since the newly supplied non-record "evidence" was not omitted from the certified printed record by error or by accident or by misstatement, but represents an entirely gratuitous proffer of unsworn hearsay not presented in any of the courts below or at any previous time revealed to petitioner's counsel, it is plain that the Government could not utilize Rule 36(6), and it has no alternative rights.

The respondent has "assumed" that the alleged substitute newly supplied non-record "evidence" which it has proffered to this Court through the means mentioned above removes

the plain illegality and unconstitutional use of Exhibits 61A-B placed by the Government in evidence in this case. The Government assumes that it can now come in with substitutes for the tainted Exhibits in evidence by submitting alleged substitutes in this irregular fashion and claiming that they were legally obtained and could have been used on the trial. The Solicitor General then proceeds to say that the use of and reference to such substitute "evidence" on appeal would not be unfair or prejudicial to the petitioner. This is a gross invasion of petitioner's rights.

Some indication may be made to this Court of the serious objections to the use in this case in its present posture of the newly supplied non-record "evidence" which the respondent now would rely upon in this Court.

1.—There are many issues of fact with respect to the legality of using the proposed substitute.

2.—The proposed substitute does not appear to have been furnished other than to the United States Attorney in New Jersey who was engaged in conducting Grand Jury proceedings. If this be the fact the deposit of the substitute with said United States Attorney rendered the substitute secret and unavailable constitutionally and otherwise to the New York prosecutor in this case.

3.—The time when the prosecutor should have come forth—if at all—with this newly supplied non record information as to the existence of the alleged substitute was before Judge Goddard in 1953 in the New York proceedings when Judge Goddard was considering whether he should outlaw the documents which became the tainted Exhibits 61A-B in evidence on the trial. It was incumbent on the Government at that time to object to outlawry of these documents on the ground, now irregularly presented, that the Government had independently obtained, through innocent means, the substitutes now proffered to this Court. The Government did not do so. It was therefore irrevocably bound not to use at any

time the presently proffered substitutes since Judge Goddard had outlawed the use of the check and the check stub involved because they were obtained in violation of constitutional right against self-incrimination. Any proffer of the substitutes at the hearing before Judge Goddard would necessarily have allowed the petitioner then the opportunity of confrontation, cross-examination and a test of the legality of the use of the presently proffered substitutes.

4. The accuracy of the newly supplied "New Jersey transcript is challenged by the petitioner and this clearly raises issues of fact; it appears erroneous on its face and bears interpolations supplied by the typist or someone else. The internal evidence that the "transcript" is a hodge-podge of confusion plainly challenges the integrity of the "transcript."

To give any consideration on this appeal to the newly supplied non-record "evidence" and to the respondent's assumptions therefrom would be to open a veritable Pandora's box of matters outside the record of the proceedings in the lower courts which is the subject matter that this Court is called upon to review. It would be grossly unfair to petitioner to confront him at the last minute on the appeal with an attempted use of newly supplied non-record "evidence." It would be plainly prejudicial to infuse into the record the hearsay now proposed and to attempt to determine petitioner's liberty on the speculations inherent in the newly supplied non-record matter.

On Saturday, September 28, 1957, we were furnished with an uncorrected page proof of the respondent's brief. We were advised by the Clerk that the final print of the brief was filed on Monday, September 30, 1957. At the time of the preparation of this affidavit we had not as yet received a copy of the final print. Our first knowledge of the Government's course and of the subject matter thereof was on September 28, 1957. I never previously had been apprised of the meeting of May 12, 1952 or of the "transcript" now pro-

sented. We are making this motion at the earliest possible moment and requesting that the disposition of this matter be accelerated so that we may be guided by the Court's ruling hereon prior to submission of our reply brief, if possible, or prior to the argument of the appeal which now has been set for October 15, 1957. We are not requesting any postponement of the argument of the appeal.

Annexed as a schedule hereto are citations to the arguments or references in respondent's brief* utilizing the non-record "evidence" and the non-record "transcript" of the non-record alleged proceedings of May 12, 1952 and May 15, 1952.

MILTON POLLACK.

Sworn to before me this
1st day of October, 1957.

TESS M. GREENFIELD,

Notary Public, State of New York,
No. 24-1560200,
Qualified in Kings County.
Commission Expires March 30, 1959.

SCHEDULE* TO FOREGOING AFFIDAVIT.

1.—Appendix A (br., pp. 72-76).

2.—Appendix B (br., p. 77).

3.—Page 28, footnote 11.

4.—Pages 28-9, paragraph beginning "On May 12, 1952" etc. and ending before the first full paragraph on page 29.

5.—Page 30, sentence reading "One of these checks and the stub are the documents of which he had given the Government copies in May 1952."

6.—Page 35, paragraph numbered 1 thereon.

7.—Page 41, beginning with the last sentence of the second paragraph going through the balance of page 41 and all of page 42 and through the first three lines of page 43 including footnotes 12 and 13 on page 42.

8.—Page 50, footnote 15.

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* All references are to the uncorrected page proofs of the Government's brief which references presumably are in the final print filed September 30, 1957 in substance.

IN THE

Supreme Court of the United States

October Term 1957

No. 9

HOWARD LAWN,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF FOREGOING MOTION.

This Court has resolutely refused to permit the introduction before it of material not properly admitted in evidence in the courts below and not properly certified to it.

Hopt v. *Utah*, 114 U. S. 488 (1885): "* * * the duty of seeing that the record contains everything that actually took place, necessary to support the conviction, is the duty of the district attorney. * * * the affidavit taken since the entry of the case in this court cannot be considered. The lawfulness of the conviction and sentence of the defendant is to be determined by the formal record, made up and transmitted as required by law, of what was done in his presence at the trial in open court * * *."

Hooey v. *Wilson*, 9 Wall. 501 (U. S. 1870): "We do not consider the supplement to the record filed in this court as before us. It was not in the case in the court below. To recognize it here would involve the exercise of original instead of appellate jurisdiction."

Pacific R.R. of Missouri v. *Ketchum*, 101 U. S. 289 (1880): "We take a case on appeal as it comes to us in the record, and receive no new evidence."

McClellan v. *Carland*, 217 U. S. 268 (1910): "We shall not enter upon a consideration of these papers, because they are not in the record, as the same has been certified to us * * *. We must take the case as it is presented here upon the stipulated return to the writ of certiorari on the record as presented to the circuit court of appeals."

Clark v. *Pennsylvania*, 128 U. S. 395 (1888): "We act only upon the record of the court below * * *."

South Carolina v. *Wesley*, 155 U. S. 542 (1895): "* * * reference cannot properly be had to a transcript of the record in a case pending in another court to supply defects in the record of a case in this court."

See also *Stern & Gressman*, Supreme Court Practice 304 n. 4 (2d ed. 1954).

The introduction of matters not of record merits the rebuke which this Court administered in *Schley* v. *Pullman's Palace Car Co.*, 120 U. S. 575 (1887):

> "Before entering upon the consideration of the case it is proper to notice the motion made in behalf of the plaintiff in error, to strike out certain parts of the printed argument filed by the counsel for the defendant in error. Notwithstanding the agreement that the case should be heard in the court below upon the single question referred to in the stipulation, the counsel for the defendant in error states many things, which he declares to be 'incontrovertible facts,' and within the knowledge of opposing counsel, but which are wholly unsustained by anything in the record. The motion to strike out relates to those matters. The excuse given for this breach of professional propriety is 'the extreme brevity of the record.' But it is the same record upon which counsel for the Company succeeded for his client, and which, by agreement, contained all that was to be submitted to the court. The excuse given furnishes no apology whatever for his violation of the terms of the stipulation;

much less does it palliate his attempt to influence the decision here, by reference to matters not in the record and which he must have known could not be taken into consideration. It is only necessary to say that the facts *dehors* the record, which have been improperly introduced into the brief of the counsel for the defendant in error, have not in any degree influenced our determination of the case."

Non-record "evidence" cannot determine the issues on an appeal to this Court or be considered and we submit that it was improper to utilize the same in a brief filed with this Court.

Respectfully submitted,

MILTON POLLACK,
Counsel for Petitioner, Howard Lawn.

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SUPREME COURT, U.S.

No. 9

In the Supreme Court of the United States

OCTOBER TERM, 1957

HOWARD LAWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN RESPONSE TO PETITIONER'S MOTION TO STRIKE

J. LEE RANKIN,
Solicitor General,
ROGER FISHER,
Assistant to the Solicitor General,
Department of Justice, Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 9

HOWARD LAWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN RESPONSE TO PETITIONER'S MOTION TO STRIKE

At every stage of this proceeding, petitioner has charged Government counsel with misconduct. We believe that his latest charge, contained in his motion to strike filed October 2, 1957, is as "utterly unwarranted" (R. 2972) as those so characterized by the Court of Appeals.

I

The material in the Government's brief which petitioner asks be stricken relates to the single issue of the use at the trial of Exhibits 61A and 61B. This issue was first raised by petitioner in the Court of Appeals.*

* Petitioner has at no time filed a motion in the district court for a new trial on this ground.

where he contended, as he does here, that the use of these exhibits violated his privilege against self-incrimination. The Court of Appeals found that petitioner had examined the items at the trial and had decided to make no objection. (R. 2971.) In his brief on the merits in this Court, petitioner renews the argument and supports it on the basis of statements of fact many of which have no basis at all in the record and are merely founded on petitioner's naked assertions. Some of these assertions, we believe, are not only incorrect but imply serious misconduct on the part of the Government before the Court of Appeals.

We were faced with the choice of insisting that petitioner confine himself to the record or answer matters he raised outside the record by facts de hors the record. Under these circumstances the Government thought it fair and proper to refer to facts outside the record where petitioner stated them incorrectly and where the true facts, known to petitioner, seemed beyond dispute. This also seemed the better course because of the implications of misconduct. We have tried to give the court the whole story upon which to base its judgment. If there is a *bona fide* dispute as to the facts outside the record to which we referred, the Court should not, of course, rely upon them in reaching a decision.

The Government's brief fully disclosed the points at which reference was made to facts outside the record and, we thought, adequately explained why this was done. We respectfully refer the Court to the brief, page 28, footnote 11, and pages 39–41. At the

risk of further diverting the Court's attention from the merits of the case, we here explain at greater length the circumstances which caused the Government, in answering petitioner's charge, both to make a statement as to facts not of record and to indicate the basis on which that statement was made. We review petitioner's conduct in this proceeding and his assertions outside the record for that reason.

In this case, petitioner, convicted of a criminal offense, failed to assert at the trial level the constitutional privilege which he now claims. As a consequence, he failed to get into the record a number of facts upon which the establishment of his claim would depend. He then attempted in the Court of Appeals, and in this Court, to supplement the record by his own assertions entirely outside the record. That petitioner's case is based on facts outside the record is apparent from his brief. As pointed out in our brief, pages 40–41, his position with respect to the use of Exhibits 61A and 61B rests on a long list of factual assertions, some of which are incorrect and many of which are not based on matters of record. For example:

1. Petitioner asserts that the pink date stamp on the back of Exhibits 61A and 61B was not seen by defense counsel at the trial. (Br. 16.) The record certainly does not establish this fact.

2. Petitioner's brief asserts, "This pink stamp did not appear on exhibits legally obtained by the Government." (Br. 17.) This assertion is wholly outside the record and, we believe, incorrect. We understand that a number of documents produced be-

fore the grand jury by government witnesses were reproduced on days when the grand jury was sitting.

3. During oral argument in the Court of Appeals, petitioner held up an original check and check-stub, which has now been forwarded to this Court (see printed copies facing R. 2998 and facing R. 3000). Petitioner asserts that these are the documents which he produced before the 1952 grand jury. We believe this to be the case, but it is not a fact of record.

4. The foundation of petitioner's case is that the check dated November 7, 1945, which he produced before the grand jury in 1952 (R. 2798), is the original of the document of which Exhibit 61A is a copy, and that the stub there referred to (R. 2798) is the document of which Exhibit 61B is a copy. Although we accept this as true, and a jury might be warranted in reaching the same conclusion, it is not established by the record.

5. Petitioner asserts that it is "incontrovertible" that Exhibits 61A and 61B were "papers obtained in violation of the privilege against self-incrimination". (Br. 18.) A factual premise of this statement is that the papers were personal papers of petitioner Lawn as to which he could have asserted a Fifth Amendment privilege. The record provides no support for such a proposition. As stated in our brief (p. 45) (see also *infra*, p. 11), we believe the record amply demonstrates that the documents were in fact business records as to which petitioner had no privilege. A second factual premise of petitioner's assertion is that petitioner Lawn had not waived whatever privilege he might have had with respect to these documents prior

to the time they were obtained. This extra-record assertion we felt constrained to deny and to explain the basis for doing so.

6. Petitioner states that it is "incontrovertible" that the papers were "ordered by two District Judges to be returned to Lawn, and it is incontrovertible that the prosecutor did not comply with the Judges' orders." (Br. 18.) These statements are unsupported by the record. In fact, the record shows that the return orders applied only to originals, not copies. (See Gov. Br. pp. 45–47, and record citations there given.) And petitioner himself states that the "originals" were "returned to petitioner." (Br. 13.)

7. In seeking to establish actual prejudice by the Government's use of one photostatic copy of the check and check-stub, rather than another, petitioner made a series of assertions as to which there is not the slightest basis in the record. In the Court of Appeals, Government counsel had stated that other copies of the check and stub were in its possession months before the 1952 grand jury proceeding and could have been easily substituted at trial if objection had been made to the copies offered. (R. 2971). Petitioner responded by making extensive assertions in his brief in this Court as to extra-record facts.[1]

[1] *E. g.*:

"There were no other copies of Exhibits 61A B in this prosecutor's possession before the 1952 proceedings or at the time of the trial. The prosecutor did not obtain the so-called 'untainted' copies until January, 1956, or nearly a year after the trial and just before the argument of the appeal below. After being advised that petitioner's appellate counsel had detected the use of unconstitutional evidence, the prosecutor then

These, in effect, charged Government counsel with deliberately deceiving the Court of Appeals and suggested, at least, that the facts were contrary to what the Government had said.

Against this background the Government considered it proper to present to the Court [2] the grounds for the factual conclusion that petitioner had waived any privilege with respect to the check and stub by provid-

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set about for the first time to seek out and secure the copies referred to as 'untainted' by the Court below. Seemingly these 1956 copies were obtained from a New Jersey Grand Jury's custody without petitioner's knowledge or consent (R. 2977-9)." (Br. 19.)

"The naked facts are that the prosecutor used Exhibits 61A–B on the trial and these were the only copies in his possession or that he had ever seen up to and at that time." (Br. 19.)

"The reference to other copies in the Government's possession is to a copy of the questioned papers which were in the possession of a Grand Jury in New Jersey. The prosecutor in this case did not have in his own possession in New York any copies of the papers other than the tainted copies. However, in January 1956 during the pendency of the appeal herein the New York prosecutor sent to New Jersey and obtained a photostat from the files of the New Jersey Grand Jury of Exhibits 61A–B (R. 2979)." (Br. 24.)

[2] The Court may, in its discretion and where circumstances so warrant, consider matters outside the record. See, *e. g.*, *Norris* v. *Alabama*, 294 U. S. 587, 593 fn. 1. At least twice in the last Term, the Government, during argument, was asked to supply material dealing with the particular case and outside the record. (*Soriano* v. *United States*, 352 U. S. 270 (the administrative file on the claim there involved); *Pollard* v. *United States*, 352 U. S. 354 (the transcript of what took place in the courtroom between the first colloquy with the defendant and the subsequent, invalid sentencing.) Where the documents are undisputed or in the nature of official records, the exercise of this discretion may be particularly justified.

ing the Government with a copy in May 1952. In so doing, consideration was given to the following:

1. The circumstances of the May 1952 hearing (stenographic transcript, formal advisement of constitutional rights, under oath, counsel present, numerous witnesses, signed receipt, etc.) were such that it was assumed petitioner would not dispute the basic facts.

2. The matter could not have been introduced at the trial, because petitioner had not raised the question.

3. In the Court of Appeals the Government made an "offer of proof" that it had acquired copies prior to the 1952 grand jury proceeding.

4. Petitioner in his brief stated as facts outside the record that the Government did not have available any other copies which could have been used at the trial. (Br. 19, 24, 26)

5. Petitioner's allegations, in effect, charged the Government with deliberately deceiving the Court of Appeals as to the facts.

6. It appeared that petitioner was asserting before this Court a violation of a constitutional privilege which petitioner had previously waived. (We do not mean, thereby, to cast a reflection on petitioner's present counsel, who has stated under oath that at the time of filing his brief in this Court he "never previously had been apprised of the meeting of May 12, 1952 or of the 'transcript' now presented". Motion to Strike, 7–8.)

7. We considered the transcript as establishing a formal waiver of privilege which should be treated by

an appellate court, if that is where the privilege is first asserted, as here, in the same way that it considers matters relating to mootness, abatement, and other such issues first raised after the case is on appeal.

8. As petitioner recognizes, the Government's brief fully disclosed the nature of the material to which it referred and the basis for the factual statements. The brief also explained why the material was being referred to. (Gov. Br. 39–41.)

9. The alternatives of letting petitioner's unsupported assertions stand, moving to strike them, or making a bare, undocumented, denial seemed less desirable than fully disclosing the factual basis for our position.

II

We agree with the position, implicit in petitioner's motion to strike, that the Court should not, in reaching a decision, rely on any fact outside the record as to which there is a *bona fide* dispute. But it is not clear to us that petitioner challenges the basic facts to which our brief referred, namely, that some two months prior to the 1952 grand jury proceeding petitioner, formally advised of his constitutional rights, discussed under oath and delivered to the Government at an administrative proceeding, not before a grand jury, photostatic copies of the check and stub of which Exhibits 61A and 61B are also photostatic copies. The suggestion of petitioner's counsel that the transcript of

the hearing may not be accurate (Motion to Strike, 7), and his statement that "There are many issues of fact * * *" (Motion to Strike, 6) do not seem directed at the facts which we assumed, and still believe, are beyond dispute. Should petitioner's counsel, after discussing the matter with petitioner, indicate to the Court that in good faith he disputes the truth of the essential facts referred to in the portions of the Government's brief which he asks be stricken, the Government would not oppose the striking of these matters. We believe, however, that a formal "striking" is not necessary and that the Court may simply reach its decision without relying on any facts outside the record (including those asserted by petitioner) as to which there appears to be a *bona fide* dispute. This would avoid the problem of considering which portions of petitioner's brief should be struck on the same ground.

But if all extra-record matters are to be struck* and the Court wishes to decide the issue solely on the record, we believe it must affirm the decision below since petitioner failed to put in the trial record the objections and alleged facts on which he now rests.

Petitioner suggests two legal grounds why copies of the check and stub obtained in May 1952 might not

*If the Court should so conclude, we respectfully request that this response be treated as a cross-motion to strike from petitioner's brief references to matters outside the record. See *supra*, pp. 3-6.

have been admissible at the trial if he had objected to the copies that were offered. (Motion to Strike, 6) The first is that the secrecy of a grand jury proceeding attaches to documents delivered to a United States Attorney under the circumstances indicated by the transcript. The second is, in effect, that Judge Goddard's dismissal of the 1952 indictments makes it *res judicata* that each document presented to that grand jury was privileged as to each of the defendants there involved. We believe that neither argument has any merit. We discuss the second in our brief, pages 43–45. That the Court may have to consider these legal issues not passed upon by the district court is one consequence of petitioner's not having raised the issue of privilege at the trial; it would not seem a proper ground for ignoring facts, if they are undisputed.

We believe action by the Court on petitioner's motion to strike should be held in abeyance pending argument of the case next week. The extent to which the facts involved are undisputed may be clarified by the oral argument. Should the Court, after argument, be satisfied that certain facts are undisputed it could then, in its discretion, and we believe properly, take those facts into account. To the extent that the Court should find there exists a *bona fide* dispute as to any of the facts not disclosed by the record, the Court should not, we agree, rely on such facts in reaching a decision. As stated in our brief, "It is our view that the record, by itself, adequately demonstrates that there has been no violation of petitioner's

constitutional rights and no prejudice." (Br. 41.)[3]

There should be no necessity for a remand.[4]

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

ROGER FISHER,
Assistant to the Solicitor General.

OCTOBER 1957.

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[3] In his motion to strike petitioner asked that the Government be directed to file a corrected brief omitting any reference to matters not of record. (Motion to Strike, 2.) In view of our suggestion that consideration of the motion to strike be postponed, and for convenience of counsel and the Court, we outline briefly in an Appendix, *infra*, pp. 11–13, grounds, based wholly on the record, which we believe dispose of the contentions made by petitioner in Point I of his brief, pp. 22–34.

[4] Should the Court disagree with the Government and believe that the decision of the Court of Appeals cannot be sustained on the ground on which it relied or on the other grounds suggested, any remand should not be for a new trial but to the district court to enable petitioner to file a motion for new trial and to have a hearing on that motion at which time petitioner could seek to establish his privilege with respect to the check and stub, the non-availability of other copies, no prior waiver, etc.

APPENDIX

Outline of Grounds, Wholly Within the Record, Which Dispose of Petitioner's Contentions With Respect to Exhibits 61A and 61B

(See footnote 3, *supra*, p. 10)

1. *The record shows that the check and stub were business records as to which petitioner could assert no privilege against self-incrimination*

As stated in our brief (page 45), the record shows that the cancelled check and corresponding stub were business records of the Tavern Fruit Juice Company, an unincorporated enterprise. Petitioner so acknowledged when he produced them before the 1952 grand jury in response to the subpoena for books and records of the various companies. (R. 2785, 2787, 2798.) Petitioner himself revealed that the papers were not from his personal files but that he had acquired them, at his own request, about ten weeks before from Giglio, one of the partners. (R. 2803.)

On these undisputed facts drawn from the record, we believe the law is clear. An individual cannot assert his personal privilege against self-incrimination with respect to the business records of a corporation or an unincorporated association. *United States* v. *White*, 322 U. S. 694. There is no issue as to the circumstances in which partnership records might be the personal papers of one of the partners, since Lawn was not a partner of the Tavern Fruit Juice Company but rather an employee. (R. 1023.) And the character of the documents was not altered by the

fact that petitioner later acquired custody. *Grant* v. *United States*, 227 U. S. 74; *Wheeler* v. *United States*, 226 U. S. 478.

2. *Petitioner's counsel waived any objection to these very exhibits at the time they were offered in evidence.*

The items to which petitioner now objects were examined by his experienced trial counsel who interposed "No objection." (R. 1022.) The fact that the date on which the particular photostatic copy was made appeared on the back of the document in no way concealed from counsel what the exhibit was. (Gov. Br. 48–49.) This was the ground relied on by the Court of Appeals. (R. 2971.)

Even if one assumes that petitioner's counsel thought that it was a different copy of the check which was being offered, having waived any objection to one copy petitioner cannot assert a privilege as to copies no more incriminating than the one as to which privilege was waived.

3. *The failure to file the memorandum requested by the district court suggesting the trial evidence that might have been based on evidence before the 1952 grand jury was an independent waiver of any objection which reasonable compliance with the trial court's request would have produced.*

Although not argued as a separate ground as to this issue in our brief, we believe that petitioner's failure to submit the memorandum repeatedly requested by the trial court (R. 1957–1958; 1962–1963, 2076; Gov. Br. No. 10, pp. 31–32) constitutes an independent waiver of any objection to Exhibits 61A and 61B. Petitioner produced only four items before the 1952 grand jury (R. 2798); of two of these Ex-

hibits 61A and 61B are copies. Petitioner was asked by the trial judge to examine the record to see if any of the exhibits introduced in evidence at the trial could have come from any of the items produced before the 1952 grand jury. Any compliance with the judge's request would have revealed to petitioner what he now claims he discovered for the first time on appeal. Whatever the date on the back of the photostat, compliance with the court's request would have caused petitioner to suggest that perhaps a photostatic copy of a check might have come from the check which he produced before the 1952 grand jury. Having waived the right to file the memorandum, petitioner also waived the objections which that memorandum would have raised.

4. *No harm or prejudice.*

Petitioner's claim, in essence, is that it was a denial of due process to use one particular photostatic copy of a check rather than the photostatic copy which his counsel thought was being introduced at the trial. There was no possible harm or unfairness to petitioner, one copy of the check was no more incriminating or damaging than another.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 9

HOWARD LAWN,

Petitioner,

—vs.—

UNITED STATES OF AMERICA,

Respondent.

REPLY TO GOVERNMENT'S MEMORANDUM ON PETITIONER'S MOTION TO STRIKE.

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The memorandum submitted by the Government in response to petitioner's motion to strike (hereinafter "Response") rests, we believe, on misapprehensions of law and misreading of the record. The Government again has submitted material *dehors* the record certified to this Court.

The basic error in the Government's position is its contention that the issue concerning Exhibits 61A and 61B was first raised by petitioner in the Court of Appeals (pp. 1-2, Response). To the contrary, the issue of illegality of these papers for all use in this prosecution was raised by petitioner and adjudicated in his favor, in advance of the trial, by Judge Goddard in 1953.

Petitioner raised his constitutional objection to the papers used on trial as Exhibits 61A-B, in the District Court (R. 2866-71), in the manner *approved* in *Cogen* v. *U. S.*, 278 U. S. 221 (1929), and in the manner *required* by other federal courts. *Waldron* v. *U. S.*, 219 F. 2d 37 (D. C. Cir. 1955); *U. S.* v. *Wheeler*, 149 F. Supp. 445 (W. D. Pa. 1957).

These cases teach that a defendant should (and probably must) move seasonably before the trial to raise his constitutional objections to evidence improperly obtained and that the decision on such an objection determines the issue for the trial. Petitioner raised such an issue before trial. Judge Goddard then ruled that Exhibits 61A and B (then Grand Jury Exhibits 2, 4) had been unlawfully obtained by the Government, and outlawed and ordered them returned to the petitioner (R. 2871).

The Government would have this Court excuse the "inadvertent mistake" in using outlawed evidence, which is "inconsistent with the affidavits" denying such use "submitted by the prosecutor" (Br. No. 9, p. 46), by arguing that Exhibits 61A and B were papers of a partnership of which Lawn was not a member and consequently that Lawn, although in possession thereof, had no privilege with respect thereto (pp. 12-13, Response).* This does not suffice as an answer for the "inadvertent mistake" in using tainted evidence. Judge Goddard held that Lawn had a privilege which was violated. The correctness of Judge Goddard's order may not now be litigated collaterally, as the Government concedes. Accordingly, since the papers were ordered to be returned to the defendants, they were not available against any defendant, including Lawn. *McDonald* v. *U. S.*, 335 U. S. 451 (1948).

The foundation of petitioner's claim relating to Exhibits 61A and B is that he was compelled to produce the originals

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* The cases cited by the Government are completely wide of the mark. *Grant* and *Wheeler* simply hold that where the principal has no privilege the agent who has the papers in his custody has no privilege. Conversely it would seem that where, as here, the principal has a privilege, so has the agent. Lawn was a principal, certainly with respect to his endorsement which was the most significant part of the Exhibits. *White* simply holds that an officer of a labor union has no personal privilege as to the union's papers. In order to invoke the privilege the person need only hold the papers in a personal capacity, as did Lawn here. *U. S.* v. *White*, 322 U. S. 694, 699 (1944).

thereof before the Grand Jury and that the copies, Exhibits 61A and B, were made by the Grand Jury from these originals subpoenaed by the Grand Jury (p. 4, Response).

These are record facts.

The record facts.

Lawn and his papers were subpoenaed before the Grand Jury on July 15, 1952 (R. 2798). Lawn was thereby compelled to appear and did produce four papers which were marked Grand Jury Exhibits 1 to 4, of that date (R. 2802).

The four papers consisted of three checks endorsed by Howard Lawn and drawn by Tavern Fruit Juice and dated respectively November 7, 1945, February 3, 1946, March 11, 1946, and a check stub that related to the first check (R. 2798).

Trial Exhibits 61A and 61B (facing R. 2999 and R. 3001) bear the following marks respectively: "G. J. Exhibit 2 7/15/52" and "G. J. Exhibit 4 7/15/52" (R. 2998-9).

Trial Exhibit 61A is the copy taken by the Grand Jury of the check described as Grand Jury Exhibit 2 and bears both the Grand Jury and the Trial Exhibits markings. Trial Exhibit 61B is the copy taken by the Grand Jury of the related check stub described as Grand Jury Exhibit 4 and bears both the Grand Jury and the Trial markings.

Additional errors of Government Response.

The Government lists six further statements which it erroneously says are improperly relied on by petitioner because they are not in the record (pp. 3-5, Response). Seriatim, these six erroneous statements of the Government are:

1. The Government says that the petitioner supplies the information *dehors* the record that the pink date stamp was not seen by defense counsel at the trial (p. 3, item 1, Response). It is true that petitioner's present counsel claims to have been the first to discover the illegal use and that he

made this discovery by means of finding the pink stamp inside the folds of the exhibits. We believe that it is reasonable to draw the inference of such first discovery and so to argue because, this accepts at face value the repeated and solemnly given and sworn assurances of the trial prosecutor of his certainty that no suppressed documents were used on the trial in any way. The alternative would have been for counsel to charge a knowing and wilful violation of petitioner's rights, wilful disobedience of two Court orders and false swearing. We believe that it was a further reasonable assumption to be drawn from the record, that present counsel, was the first to discover the "inadvertent mistake' implying thereby that defense trial counsel failed to perceive the pink stamp inside the folds of the exhibits, one of which had its sides actually stapled together. To reach this inference the petitioner relies on the record proof that throughout the trial the defense trial counsel was demanding a hearing so that he could ascertain what tainted evidence had been used either directly or as leads and clues. And there is not a shred of record evidence to suggest that the defense trial counsel intentionally proceeded to relinquish a known right. What petitioner does say in this connection is that the two exhibits were folded or stapled so that there was no warning on the face of them that there was a teil-tale pink stamp on the ostensibly blank inner sides thereof; the pink stamp was not physically visible but was concealed within the folds. This argument of petitioner is demonstrated by the record evidence, the exhibits themselves.

2. The Government says that the petitioner supplies *dehors* the record the claim that this pink stamp did not appear on exhibits legally obtained by the Government (p. 3, item 2, Response). The petitioner's claim appears within and is proved by the record as to these and every exhibit *used on the trial*. Examination by this Court of the exhibits used on the trial and certified to this Court will disclose that there is no pink stamp on any of them. Whether other Grand Jury exhibits, not used on the trial, were so stamped (pp. 3-4, item 2, Response) is not only immaterial but itself rests on present assertions of the Government *dehors* the record.

3. The Government admits that the originals of Grand Jury Exhibits 2 and 4 certified to this Court are the ones produced by Lawn before the 1952 Grand Jury, but the Government says that this supplies a fact not of record (p. 4, items 3 and 4, Response). However, the Government has overlooked the fact that these originals are of record in this case. They were part of the Grand Jury proceedings which Judge Goddard reviewed and these proceedings are part of the record before this Court. The record on appeal from Judge Goddard's order was certified to this Court and discloses that "all necessary exhibits are included in the record" on the Government's appeal therefrom (R. 2877).

4. The Government asserts that the *factual* premises supplied by petitioner *dehors* the record, include the premises that the papers were obtained in violation of Lawn's privilege or that Lawn had not waived his privilege (p. 4, item 5, Response). These are not merely premises of fact; they are matters of law decided by Judge Goddard. Both matters were decided in Lawn's favor by Judge Goddard. Judge Goddard specifically held that these very papers were obtained in violation of Lawn's privilege. Implicit in that holding is the necessary holding of law that there had been no waiver by Lawn prior to the date of Judge Goddard's order. And, this is not the time for the Government to argue that the Judge's ruling was a mistake.

5. The Government says that there is no record support for petitioner's statement that two judges ordered Exhibits 61A and 61B returned to Lawn since, it says, the return orders applied only to originals, not copies (p. 5, item 6, Response). The record shows that Judge Goddard specifically ordered that whatever was produced by the defendants to the Grand Jury was to be returned to them except for corporate papers. And Judge Palmieri's order is as broad as Judge Goddard's order. The law is that copies made from tainted originals are also tainted. *Silverthorne Lumber Co. v. U. S.*, 251 U. S. 385 (1920).

6. The other matters allegedly supplied by petitioner *dehors* the record are references in petitioner's brief to matters in the petition for rehearing in the Court below (pp. 5-6, item 7, Response).

Preliminarily, none of the facts set forth in that petition for rehearing are necessary to establish here the unconstitutional use of tainted evidence. We assumed that since the certified record (as required by Rule 36) does contain the petition for rehearing (the facts of which were not controverted below by any affidavit on the Government's part) the matter in this petition is available for use as record matter. If such an assumption is an error and the facts in a petition for rehearing in the Court below are not part of the certified record which may be referred to in this Court, the claims of unconstitutional use nonetheless remain with solid support in the record made in the District Court.

The Government finally argues:

> "* * * any remand should not be for a new trial but to the district court to enable petitioner to file a motion for a new trial and to have a hearing on that motion at which time petitioner could seek to establish his privilege with respect to the check and, study the non availability of other copies, no prior waiver, etc." (p. 11, n. 4, Response.)

This argument overlooks the fact that the errors complained of and asserted by this appeal are errors of record. The Government's proposed procedure would apply only to situations of newly-discovered evidence which are not matter of record. Furthermore, the suggestion that it is incumbent on petitioner to prove "the non availability of other copies, no prior waiver, etc." (p. 11, n. 4, Response) shifts from the Government its burden of proof of such contentions.

Nardone v. *U. S.*, 308 U. S. 338 (1939), spells the rule to be applied. When tainted proof has been used, advertently or inadvertently, the remedy to be administered is a new

trial, preceded by a hearing in which the Government is required to prove that the evidence it seeks to use on the trial is untainted. See *Nardone* v. *U. S.*, 127 F. 2d 521 (2 Cir. 1942).

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IN THE

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UNITED STATES OF AMERICA,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

PRELIMINARY STATEMENT.

The Government has utterly failed to meet petitioner's arguments that:

1. There was complete failure to prove that petitioner had knowledge that the other defendants owed taxes, had not paid their taxes, and did not intend to pay their taxes. Such knowledge was pre-requisite to conviction of petitioner (Pet.'s Br. pp. 57-61).

2. Absent a claimed tax deficiency or willful failure to disclose the taxpayer's liability there can be no conviction on a Sec. 1154(b) crime (Pet.'s Br. pp. 39-40).

3. The dismissal as to ABC mandated dismissal of Count 9 as to Lawn, the alleged abettor of ABC (Pet.'s Br. pp. 48-9).

These failures alone require dismissal of the indictment.

The Government attempts to answer petitioner's contention that he was entitled to a hearing on trial use of illegal evidence, by arguing erroneously that such hearing was not denied.

The Government in effect concedes that illegal evidence (Exs. 61A-B) was used to convict Lawn ("the prosecutor committed an inadvertent mistake," says the Government [Br. 36]), but argues the Government, there was no objection and the error, it says, was harmless. But Lawn did object in the manner outlined by this Court in *Coppa* v. *U. S.*, 278 U. S. 224 (1929); and the claim of harmlessness is predicated on matter dehors the record, and is constitutionally unsound.

The Government contends that the prosecutor's substandard conduct should be approved because it was not objected to. That is no answer to the utter lack of procedural due process herein. By skilful manipulation of record references, the Government claims that petitioner's trial counsel opened the door to the prosecutor's inflammatory summation. But an examination of the record itself exposes the hollowness of this contention.

The Government seeks to link Lawn to crime by pointing to trivia, innocent acts, evidence having no probative force, and to attempts to head off prosecution which took place after the alleged crimes were completed. As matter of law these are not sufficient to sustain Lawn's conviction.

I.

EXHIBITS 61A-B ARE SQUARELY WITHIN JUDGE GODDARD'S ORDER OF OUTLAWRY; THEIR USE VIOLATED JUDGE GODDARD'S ORDER; AND THERE WAS NO WAIVER.

The Government in effect now tacitly admits that it used tainted evidence, Exhibits 61A-B, and leads and clues derived therefrom, in order to convict petitioner. It now attempts to evade the effects of this improper use by arguing that it had, throughout this entire proceeding, copies of the proscribed exhibits which it had obtained innocently.

This argument, based as it is upon material not in the record and which the Government has sought to introduce now, at the last moment, is improper. It is also legally inadequate. The thin excuse for thus attempting to influence the decision here is, that petitioner's point as to Exhibits 61A-B allegedly "rests on assertions and factual assumptions outside the record" (Br. No. 9, p. 40).* This allegation is untrue.

A. Petitioner's contentions are based only on the record in the Courts below as certified to this Court.

Petitioner makes no assertion or factual assumption outside the record. Petitioner's contentions as to Exhibits 61A-B rest only, we repeat only, on the record in the courts below as certified to this Court.

Presumably the Government is referring to petitioner's contentions that Exhibits 61A-B had been reproduced by photostatic methods on the same day Lawn appeared before

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* "Br. No. 9" refers to the brief of the United States in *Lawn* v. *U. S.*, Oct. Term, 1957, No. 9.

"Br. No. 10" refers to the brief of the United States in *Giglio and Livoti* v. *U. S.*, Oct. Term, 1957, No. 10.

the Grand Jury from copies produced by Lawn (Br. No. 9, p. 40). This is shown by the record (R. 2798-2803) and by the pink stamp appearing on the insides of the Exhibits themselves (Facing R. 2999 and 3001).

Whether or not the Government had available other copies is legally immaterial—it used the tainted ones. Petitioner's arguments as to Exhibits 61A-B do not depend on whether or not there were other copies in the prosecutor's possession. The point is that there is no record proof that the prosecutor had other copies or that such other copies were untainted.

The originals of Exhibits 61A-B, certified to this Court (Facing R. 2998, 3000), are Grand Jury Exhibits 2 and 4 (R. 2802). They were part of the record before Judge Goddard (R. 2877). In any event petitioner's contentions do not rest thereon.

The facts and inferences set forth in the petition for rehearing in the Court of Appeals are part of the certified record (R. 2977-2986). However, it is not necessary for petitioner to rely thereon.

B. Judge Goddard outlawed and ordered the return of Exhibits 61A-B.

The Government seems to argue that petitioner had no privilege with respect to Exhibits 61A-B (Br. No. 9, p. 45), and that Judge Goddard did not order their return because they were photostats (Br. No. 9, pp. 45-48).

First, this is a collateral attack on Judge Goddard's order which the Government concedes is beyond attack (Br. No. 9, p. 43; Br. No. 10, p. 13 n. 1).[1] The fact is that Judge God-

[1] It is unimportant what effect the decision of this Court in *Costello v. U. S.*, 350 U. S. 359 (1957), has upon so much of Judge Goddard's order as dismissed the indictments. Whether or not the 1952 indictments should have been dismissed, it is still firmly the law that documents obtained in violation of the constitutional privilege against self incrimination may not be used on a trial and must be returned to a defendant. This is the aspect of Judge Goddard's order on which petitioner relies.

dard held that Lawn had a privilege as to the Exhibits, and, contrary to the Government's contention Judge Goddard's decision was precise as to which classes of papers were privileged and which were not.

As to the four documents produced by Lawn, Judge Goddard specifically referred to them as partnership papers produced by Lawn in obedience to the subpoena (R. 2867).

Thus the order of Judge Goddard directing the return of partnership and personal papers to the defendant who produced them (R. 2871), could only have reference, in context, to the papers which became Trial Exhibits 61A-B.

Judge Goddard expressly distinguished between corporate and non-corporate records. The former did not have to be returned (R. 2869), but the latter had to be returned (R. 2871).

If Judge Goddard was in error in ordering the four papers returned to Lawn, it is too late for the Government to challenge the order. But there was no error.

Exhibits 61A-B bore Lawn's personal endorsement (R. 2995) and showed the receipt by him of moneys. It was the purpose of the prosecutor and he proceeded to claim that this receipt of money through this endorsement represented fruits of crime. Lawn had possession and the right to possession of the evidence that he had received money in the form of an endorsed paper carrying his signature. The papers were plainly records personal to Lawn as much as anyone else, and were personally in his hands.

Regardless of to whom the papers should have been returned they were unavailable to the Government; they had been outlawed.

As this Court held in *McDonald* v. *U. S.*, 335 U. S. 451, 456 (1948):

> "If the property had been returned to McDonald, it would not have been available for use at the trial.

> We can only speculate as to whether other evidence which might have been used against Washington would have been equally probative."

Second, when Lawn moved before Judge Goddard for a return of documents, the only documents in the Government's possession coming from him were four photostatic copies marked Grand Jury Exhibits 1 through 4. The 1952 Grand Jury, in indicting Lawn, thus had before it only photostatic copies of his papers. The motion before Judge Goddard was directed to these papers. Judge Goddard specifically ordered the return of "any and all partnership and personal records produced by them * * *." (R. 2873). The four papers which Lawn produced are specifically recited in the course of Judge Goddard's opinion (R. 2867: "Lawn produced four partnership papers in obedience to the subpoena."), and these four papers could refer only to photostatic copies, since those were the only papers the Grand Jury had.

The record makes it clear that Judge Palmieri also directed the return of "the partnership and personal records produced by defendants * * *" (R. 184).

But even if the orders of the two District Judges did not by their very terms apply to photostatic copies, it should be plain to the Government that these orders could not be circumvented by using photostatic copies. Were it not for the Government's argument, petitioner would have thought that this matter had been settled once and for all by *Silverthorne Lumber Co.* v. *U. S.*, 251 U. S. 385 (1920). The strictures of the Supreme Court of California upon similar conduct in *People* v. *Berger*, 44 Cal. 2d 459 (1955), are pertinent here.

The Government is in a hopeless dilemma. Its brief confesses that the use of Exhibits 61A-E on the trial was "an inadvertent mistake," "the prosecutor committed an inadvertent mistake" (Br. No. 9, pp. 49, 36). It confesses further that such use was "inconsistent with the affidavits submitted by the prosecutor and his associates (e.g. R. 82, 2948)" (Br.

No. 9, p. 49]. Inconsistently, the Government then argues that the use of Exhibits 61A-B on the trial did not invade petitioner's constitutional rights because these exhibits were not among the exhibits suppressed and ordered returned, since they were merely copies (Br. No. 9, p. 47). But if Exhibits 61A-B were not tainted, why does the Government confess that the prosecutor "committed an inadvertent mistake" and say "the other copy could have been offered" (Br. No. 9, p. 36)? Candor requires the Solicitor General at long last to admit plainly and unequivocally—if he speaks at all on the subject—that no other copies of Exhibits 61A-B were in the possession of the prosecutor until nearly one year after the trial was over (R. 2977).

C. Petitioner did not waive compliance with Judge Goddard's order or authorize the prosecutor to use Exhibits 61A-B.

The Government in effect contends that Lawn waived any objection to the use of Exhibits 61A-B, (i) by appearing before the recently mentioned administrative hearing of May 1952, and allegedly delivering a photostatic copy of the check and check stub to the New Jersey United States Attorney, and (ii) by failing to object when Exhibits 61A-B were offered on the trial (Br. No. 9, pp. 41-2, 48-9).

The Government is in error on both counts.

If its statement of the facts is accurate, there is absolutely no justification for the Government's failure or refusal to call to Judge Goddard's attention, when he was passing upon defendants' motion for outlawry and return of illegally obtained evidence, the fact—if it be a fact—that Lawn had voluntarily produced a copy of the check and the stub and turned them over to the Government before he appeared before the New York Grand Jury.

It was incumbent on the Government on the motion before Judge Goddard to object to outlawry of Grand Jury Exhibits 2 and 4 on the ground that the Government had independently

obtained, through innocent means, the substitutes now me
tioned in this Court, and that petitioner had earlier agre
that the substitutes could be used against him "in any p
ceedings which the Government may bring." This wou
have given Lawn at least the opportunities of confrontati
and cross-examination in open court, opportunities the Go
ernment seeks now to deny to Lawn.

The Government took no such action. It suffered t
Court to enter an order which—on the Government's theo
it would not have, had all the facts been presented to it.

No party to a suit, and certainly not the Government
a criminal case, may dole out to the Court and to its oppone
such portions of the evidence in its possession as it desi
and then, after suffering some misfortune, attempt to bri
forward the rest, as the Government has done in this ca
if the Government really was possessed of the transcript
May 12, 1952 at the time of the motion before Judge Goddar
it had a choice: either to use the evidence then or never to
it. It made its choice and must now take the consequenc

Any other ruling would only serve to tolerate trifling wi
the Court. *Shibley* v. *U. S.*, 237 F. 2d 327, 332 (9 Cir.), ce
den. 352 U. S. 919 (1956); *Griffin* v. *U. S.*, 183 F. 2d 990, 9
(D. C. Cir. 1950).

Contrary to the Government's statement that Judge Go
dard's order did not "retroactively re-establish a privile
previously waived" (Br. No. 9, p. 11), *it positively establish*
that there had been no waiver up to the time of the decisio
and that decision is binding upon all concerned.[2]

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[2] *Zap* v. *U. S.* (Br. No. 9, p. 44) is not applicable. There this Co
held that if the document had been unlawfully seized it should not
returned since it was the means of committing a crime, and so subj
again to seizure by warrant. There was thus no point in requiring
government to perform a useless act.

At bar, Exhibits 61A-B are not subject to seizure. *Silverthor*
Lumber Co. v. *U. S.*, 251 U. S. 385 (1920). If they had been returned
petitioner, as they should have been, that would have ended the mat

It is fatuous for the Government to argue that "If petitioner had objected to their admission, the Government could promptly have established that he had no privilege as to the check" (Br. No. 9, p. 30). Object is precisely what Lawn did, and he objected in the precise manner approved by this Court in *Cogen* v. *U. S.*, 278 U. S. 221 (1929), i.e., by motions before Judges Goddard and Palmieri for the return of the documents seasonably made before the trial. Certainly Lawn is not to be penalized because he obeyed the law.

It was incumbent upon the Government on these motions to disprove Lawn's privilege, if it could, and since the Government failed to do so, Judge Goddard's order of outlawry followed by the order of Judge Palmieri necessarily bound the Government and determined the conduct of the trial. *Cogen* v. *U. S.*, *supra*, at p. 223.

D. The newly supplied alleged "evidence" is on its face suspect.

It is clear that the Government now has no right to introduce the alleged transcript of the May 1952 hearing and the alleged receipt. But the documents themselves on their face proclaim that they are suspect. There are inconsistencies throughout the document: witnesses are reported as answering questions which were directed at other witnesses; the language is at times jumpy and stilted and there are numerous breaks plainly marked "(inaudible)" in the transcript, all indicating inaccurate transcription. The extent of the inaccuracy is unaided speculation.

The alleged receipt for the papers (Br. No. 9, App. B) is dated three days after the alleged date of the administrative hearing and is signed by a Government officer who is not shown to have participated in or to have any connection with the administrative hearing.

The internal confusion in this newly presented "evidence" makes it suspect on its face. No one's liberty is to be forfeited on such a record. *Chessman* v. *Teets*, 354 U. S. 156 (1957).

E. Summary.

The crux of the Government's argument is this: "There was no possible unfairness or harm in using one particular copy of the check and stub rather than another" (Br. No. 9, p. 49). In homely terms, the Government is saying it reached into the wrong briefcase in introducing Exhibits 61A-B and came up with the wrong copy.

This goes on the assumption that there was a "right" copy, an untainted copy, available to the prosecutor. But the Government has been unable to show this, legally or factually.

All the Government's exertions cannot overcome the fact that it unconstitutionally obtained evidence from petitioner in violation of constitutional privilege, and that it unlawfully used such evidence on his trial to convict him although it was outlawed in advance of the trial. Such a conviction cannot stand.

II.

THE PROSECUTOR'S UNFAIR TRIAL TACTICS INVALIDATE THE JUDGMENT.

The Government's brief states that petitioner's trial counsel "made no objection whatever to the prosecutor's summation." (Br. No. 9, p. 51).

The failure to object does not forgive the egregious trespass on petitioner's rights because

(1) Any objection would have simply accentuated the trespass and embedded the point in the jury's mind. 6 Wigmore, *Evidence* § 1806 n. 1 (3d ed. 1940).

(2) Objection would have been useless, since the trespass was incurable. As Mr. Justice Jackson said, concurring in *Krulewitch* v. *United States*, 336 U. S. 440, 453 (1949):

"The naive assumption that prejudicial effects can be overcome by instructions to the jury * * *, all practicing lawyers know to be unmitigated fiction."

(3) "the errors are obvious, [or] otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings." *U. S. v. Atkinson*, 297 U. S. 157, 160 (1936).

The Government's brief next argues that the prosecutor's unsworn vouchers were proper because "It is the general common law rule that the party who puts on a witness, * * * vouches for his credibility'" (Br. No. 9, p. 52). It is thus no objection, the argument runs, to make these vouchers overtly to the jury.

Although a party usually vouches for the credibility of his witnesses, this only means that the party cannot impeach his witnesses, subject to numerous exceptions in the decided cases.[*]

But nowhere is there the slightest intimation that this rule authorizes an attorney—especially a prosecutor—to add his own weight to the testimony of his witnesses by unsworn statements that he and his superiors—the whole "District Attorney's office"—"vouch for them because we think they are telling the truth" (R. 2588).

The quoted language (Br. No. 9, p. 52) from the *Antonelli Fireworks Co.* case is hardly authority, especially when taken in context, as the government's brief admonishes that all quotations must be taken; for the Court immediately went on to say, 155 F. 2d at 637:

"Moreover, any possible error was cured by the forthright charge of the court instructing the jury at

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[*] Perhaps the most interesting exception for present purposes is the one allowing United States attorneys to impeach the witnesses they put on for the government in criminal trials, either directly, *Meeks v. United States*, 179 F. 2d 519 (9 Cir. 1950), or through having the court call them as its witnesses. *Ufenger v. United States*, 44 F. 2d 44 (7 Cir. 1930).

> the outset to disregard these remarks of government counsel, since the function of determining such questions of fact was exclusively its own."

The trial court's charge in *Antonelli* was as follows, 155 F. 2d at 645 n. 5:

> "I want to instruct you now that you should disregard the expressed opinion of government counsel as to the truth of the testimony given by the government witnesses and as to the falsity of the testimony given by the defendants. The province of determining the truth or falsity of any testimony is for the jury and for the jury alone, and that province may not be invaded even by the Court and certainly not by the attorney for the Government. I do not mean to infer that it was intentionally done, but it was improper to express such an opinion, and the opinion should in no way influence your verdict.
>
> "At the close of his remarks he expressed his solemn belief that all of the defendants were guilty of the charges set forth in the indictments against them. That also was improper. It may have been inadvertently said, but whether it was or not, it was improper for him to express his opinion as to the guilt of these defendants. The test of whether these defendants are guilty must be found in the evidence, and it would be entirely improper for you as jurors to allow your deliberation to be affected by the opinion so expressed. I instruct you now to disregard that opinion completely."

Even this charge did not move the late Judge Frank, who dissented, to hold that the trespass was harmless. But it is far more than petitioner Lawn received from the trial Judge in the case at bar, who not only did not instruct the jury to disregard the prosecutor's remarks, but also refused to instruct the jury that government witnesses were not to be regarded as more credible than any other witnesses (R. 2762).

The Government attempts to argue next that an attack by petitioner's trial counsel on the United States Attorney and on the special agents in his opening to the jury at the

beginning of the case (Br. No. 9, p. 53) authorized the prosecutor in his summation six weeks and thousands of pages of testimony later to make the answer that the trial prosecutor and the whole District Attorney's staff vouched for Lubben and Roth because, he said, they were telling the truth.

It should be pointed out that the quotation from the opening by petitioner's trial counsel had nothing to do with government witnesses, perjurious or otherwise (R. 2904-5). He was referring to the fact that prior government attorneys had illegally obtained indictments which Judge Goddard had dismissed, and he was courteously disassociating the present prosecutor and his staff from their predecessors (R. 2904-5).

The opening statement of defense was thus no excuse for the gross impropriety of the prosecutor's summation.

There was certainly nothing in Mr. Stryker's summation to the jury that called for the prosecutor to vouch for his witnesses. Mr. Stryker's summation stayed well within the record in pointing out to the jury the falsehoods of Lubben and Roth. It was no doubt a hardship to the prosecutor to have the perjuries of his chief witnesses pointed out to the jury from the record; but the law does not allow him to better his case by jumping into the breach himself. A trial is, after all, a quest for the truth, and no one should feel offended at the exposure of falsehood.

The cases which the government relies upon (Br. No. 9, p. 56) are not sterling authorities.[1] At any rate they do not govern here, where the prosecutor did not merely express his belief, but went further and vouched for his witnesses and

[1] The government perhaps recognized the doubtfulness of its cases by citing them under a "Cf." The prosecutor's language in the *Henderson* case does not appear in the opinion, and it is impossible to evaluate it. The prosecutor's language in the *Holt* case contained no expression of belief. The prosecutor's language in the *Tuckerman* case was temperate, and expressed a belief that the jury would convict on giving the case a fair consideration.

the truth of their tales—not he alone, but the "Government" and "the District Attorney's office."

A voucher is more than an expression of belief, as a dictionary definition shows: "v.i. 1. To bear witness; give testimony or full attestation. 2. To make assertion; affirm." The prosecutor was thus in effect calling himself, his office, and the very government itself to bear unsworn witness that what would appear to have been demonstrated to any reasonable man as the rankest perjury on the part of Lubben and Roth was really a manifestation of truth. He was thus inviting the jury to lay aside the unfavorable conclusions they could not have failed to draw about his key witnesses and to rely instead upon the authority, integrity and credibility of the government as guarantors of their credibility which had been blasted.

Wigmore properly criticizes behavior such as this, 6 Wigmore, *Evidence* § 1806 (3d ed. 1940):

> "Any representation of fact, therefore, which is *made* by him *in the argument, must not be an assertion made upon his own credit;* it must be based solely upon those matters of fact of which evidence has already been introduced or of which no evidence need ever be introduced because of their notoriety as judicially noticed facts or on the opponent's judicial admission. To bring forward in argument an assertion of fact not of these two sorts is to become a witness; and to be a witness without being subjected to cross-examination is to violate the fundamental principle of the Hearsay rule."

This impropriety is underscored by further remarks of the prosecutor himself during summation. He saw from the record that the testimony of Lubben and Roth was gravely suspect. Arguing to the jury, he said "even if you have some questions about Lubben and Roth because of their background, you can't deny the documents" (R. 2604). The documents with which he sought to bolster their testimony were the unconstitutionally obtained Exhibits 61A-B.

Whether or not the prosecutor intended it, his voucher irresistibly bore the implication that the Government believed that its witnesses were telling the truth for reasons which do not appear in evidence. The cases are clear, as the Government itself recognizes in its brief, that comment by the prosecutor is improper if it leads the jury to believe that there is other evidence known to the prosecutor but not introduced

The Judge gave no more than the standard charge about the testimony of accomplices (R. 2686), but this was not tied in to the poison spread by the argument of the prosecutor. Indeed the Judge specifically refused to charge that Lubben and Roth were entitled to no greater credibility from the mere fact that they were government witnesses (R. 2762).

The Government contends that contrary to petitioner's argument, the prosecutor on summation did not urge conviction on tax matters on the basis of collateral crimes or alleged physical threats or because of personal characteristics which the prosecutor chose to attribute to Lawn (Br. No. 9, p. 38).

The government's contention is shortly disposed of by the record, from which we quote the prosecutor's argument, as follows:

> "* * * the heart of this case is fixing, it is bribery." (R. 2587)
>
> "But the fraud and the receivership I can show you when I show the Loraine books with the doctored names in it. You will see that. There is no question about the handwriting; there is no question about the change from accounts receivable to loan from William Giglio, that is there. Well, that is all Howard Lawn." (R. 2596)
>
> "* * * from that point on you have got a story of fixing and attempted fixing that is unparalleled, so far as I know, in a tax case." (R. 2602)
>
> "* * * where he [Lawn] was later able to quite successfully operate a receivership which concealed a very large part, substantially all the assets of the American Brands Corporation." (R. 2617-8)

> "* * * but it made quite a difference to Howard Lawn, because if $15,000 was a legal fee it meant it was income to him, and if the $15,000 was a loan, it wasn't income to him.
>
> "So—and this is the evidence in the record—at about the time he was preparing his personal return, this shift came, from legal fee to loan." (R. 2605)

It is plain that the prosecutor improperly created prejudice against Lawn in this tax case, with charges of collateral crimes of bribery, forgery, fraud of creditors, attempted and actual fixing, and personal tax evasion, none of which crimes were material or established by the evidence.

The prosecutor further told the jury on summation:

> "I want to read just a few more extracts from the record because I think, after reading them, you can't do anything but decide that these people must be punished; that these are the kinds of human beings that must in some way be prevented from continuing this kind of conduct; that you must, not only for the good of the community, as far as they are concerned, but for the good of other persons, to prevent it from happening again, tell the whole community, and you are the voice now of the community, that this kind of conduct is wrong." (R. 2673)

The prosecutor then recited a threat from Roth to kill Lubben, which said the prosecutor, Roth had admitted making, and concluded as follows as to all defendants, including petitioner:

> "That is Lubben talking about the kind of person that you are now deciding, kind of person whose conduct you are now deciding whether to approve or disapprove." (R. 2674)

The record amply supports petitioner's complaint that this federal prosecution failed to comply with the standards imposed by this Court and the Constitution.

III.

PETITIONER CONCEDEDLY WAS ENTITLED TO A HEARING ON TRIAL USE OF OUTLAWED EVIDENCE; THE RECORD ESTABLISHES HE WAS DENIED THIS RIGHT.

The Government now concedes that Lawn was entitled to a hearing or the right to cross-examine to discover whether outlawed evidence was the source of evidence used on the trial.

The Government states:

> "We believe Lawn is legally sound in so limiting his argument, and—going further—are in general agreement that under the circumstances he had a right to cross-examine for the purpose of discovering the sources of the evidence used *at the trial.*" (Br. No. 9, pp. 60-1)

The Government's position is that Lawn was accorded such right (Br. No. 10, pp. 19-35; Br. No. 9, p. 60). In this the Government is in error.

After the Judge had denied petitioner's right to inquire into the procedural validity of the indictment (R. 1347) the Judge made it clear that such inquiry as well as inquiry into the trial use of outlawed evidence would not be permitted. We quote from the record (p. 1354):

> "The Court: As I sit here now, I see no greater basis for my conducting a hearing than there was for Judge Palmieri conducting one, and as I recall the record that has been made before me, I see no basis yet at all for assuming—or I see no possibility of proving the use of these books. Now I think, under the circumstances, we will go along as we are, without going into the subject, and if as the trial progresses there is any basis for my conducting such a hearing at any time on any issue, why, I will do so. But I don't see it yet.

"Mr. Wolfram: Isn't it a fact, your Honor, that the only way we can establish *whether leads and clues* have stemmed from the illegal seizure is through the witnesses as they are presented to us?

* * * * *

"The Court: I believe you have completed the record on it and I am ready to hold now that in the absence of any further foundation, I am not going to go off into the use of these records before the jury, and I am not going to conduct any side hearing at this time either, because that in itself wouldn't be very feasible." (R. 1356)

Again petitioner's counsel made it crystal clear that inquiry into trial use of outlawed documents was requested and the Judge made his denial thereof equally clear:

"Mr. Stryker: The point was really that we were not able to find out whether those things were improperly obtained or not. As the record stands, it is not clear, but we were not allowed, not permitted to inquire into the fact. That is the point, and the difficulty in which we find ourselves is due to the fact that Judge Palmieri remitted that issue which he did not decide, or permit us to obtain evidence or secure evidence or cross-examine witnesses, which, in my judgment, would have given him a basis for it, so that the matter was, of necessity, thrown into this trial, which I think it should not have been.

"The Court: What he said was, I think, that there was no adequate foundation before him for such a hearing.

"Now, if an additional foundation developed before me, why, then, I would reconsider it, as, of course, I would. We would then have a new situation." (R. 2077-8)

* * * * *

"The Court: All right, Mr. Stryker, I will briefly state that I think on the record before Judge Palmieri, his determination is the law of the case. Even if it weren't, upon that record as I have gained knowledge of it through the trial and the arguments of both of you, I would decide it exactly as he did.

* * * * *

"I find nothing in the record of this trial which suggests any use of illegal clues. I find, and as I hear your summary of argument today, I don't think you have a thing more than you had before Judge Palmieri.

"Mr. Stryker: May I

"The Court: And so, I think, at this moment, I mean, my determination on this question of whether there should be a hearing or something, which you may reopen from time to time as you have anything additional to add, but as of this moment I see no basis for such a hearing." (R. 2085-2086)

Later the record discloses:

"The Court: No, we are not going into any questions at all.

* * * * *

"Right now I am concerned with making a record on the facts and on that I am not going into these questions.

"Mr. Wolfram: And your Honor's ruling covers the question of being able to ask this witness *anything about leads and clues or what was presented to the grand jury?*

"The Court: That's right. If you have any better foundation for that, you come back." (R. 2136) (Emphasis added throughout).

IV.

NO CRIME WAS CHARGED OR ESTABLISHED AGAINST PETITIONER. THE GOVERNMENT IS UNABLE TO SUBSTANTIATE THE THEORY ON WHICH LAWN WAS CONVICTED.

In the case against Lawn there is no charge by the Government or proof that any of his alleged principals failed to disclose his or its tax liability, wilfully or otherwise. Nor was it proved that Lawn had knowledge of their tax liability or the failure to pay it or of their alleged concealment of means to pay it.

The Government, without citation of authority or reasoned argument, expressed the naked opinion that a § 145(b) crime can nonetheless be made out in these circumstances (Br. p. 62, n. 18).

We have been unable to find any authority to sustain the Government's opinion, nor does the government cite any or refute the authorities cited in petitioner's main brief, which negative the Government's theory of the law (Pet.'s Br., pp. 50-4).

The Government by its *ipse dixit* seemingly would overrule and dismiss as without merit (Br. No. 9, p. 62, n. 18) the unanimous statement of this Court in *Spies* v. *U. S.*, 317 U. S. 492 (1943) at p. 498:

> "But in view of our traditional aversion to imprisonment for debt, we would not without the clearest manifestation of congressional intent assume that mere knowing and intentional default in payment of a tax, *where there had been no willful failure to disclose the liability, is intended to constitute a criminal offense of a new degree.*" (Emphasis supplied.)

V.

THE PETITIONER'S CHARGE THAT PRIMA FACIE PROOF OF GUILT IS ABSENT HAS NOT BEEN OVERCOME. THE GOVERNMENT'S BRIEF IS UTTERLY DEVOID OF FACTS TO ESTABLISH GUILT.

Lawn has plainly challenged the conviction on the fundamental absence of evidence connecting Lawn with the crimes charged or establishing to the remotest degree that Lawn knew the taxpayers owed taxes, had not paid their taxes, and did not intend to pay their taxes. The Government brief has failed to point to *evidence* of either Lawn's connection to the crimes or to any such knowledge. Indeed, the Government fails to even mention or touch on the issue of Lawn's knowledge of facts requisite to implicate him.

1. The Government insinuates that the petitioner's brief has ignored evidence in this challenge to the sufficiency of the proofs (Br. No. 9, p. 62). However, the Government fails to point to a single item of evidence of any substance which the petitioner has failed to mention or treat in his brief. None of the trivia which the government points to is evidence as of connection of Lawn to crime, or b) of his requisite knowledge that the taxpayers owed taxes, had not paid them, and did not intend to pay their taxes.

Indeed, the schedule meticulously prepared by the petitioner (Pet.'s Br. p. 80) is apparently conceded to be an entirely accurate reflection of all the testimony. Not a single additional citation to the testimony is given by the Government.

The Government seizes on the fact that the schedule does not mention exhibits which referred to or were connected with Lawn. Only three exhibits—61A-B and 90—could conceivably be connected with Lawn. But, as the Government knows, these have been treated in petitioner's main brief; they were not omitted from petitioner's consideration of everything pertinent to a) Lawn's connection to crime, if any, or b) Lawn's knowledge, if any, that the taxpayers owed taxes, had not paid them, and did not intend to pay their taxes. The Government has been unable to point out the requisite facts in the evidence.

2. The Government summarizes what it thinks is its case against Lawn as follows:

> "To establish its case, the Government offered evidence * * * (3) that Giglio and Livorsi were the principals in the conspiracy * * * and (4) that Lawn and Roth provided the legal and accounting services required to carry out the conspiracy." (Br. No. 9 p. 5)

The Government does not document this sweeping assertion and only at page 65 in its brief does the Government again claim that Lawn provided legal services. The simple reason

for absence of documentation therefor is that there is absolutely no evidence that legal services were rendered by Lawn; the evidence is to the contrary. The Government has unfairly mingled Lawn's background with the nature of his services and his functions in the instant enterprises.

In order to put an end to any question whether Lawn rendered any legal services for the other defendants, we detail all of the legal services mentioned in the record and name the person who provided them, according to the record evidence:

a. The partnership formation was handled by attorney Goldhill (R. 300).

b. The corporate papers were drawn and the corporations were formed by attorney Rossbach (R. 1115).

c. The real estate transactions were handled by attorneys McCue, Tepper, Fox and perhaps Cornwall (R. 1222-3, 2951).

d. Taxes were handled by tax experts Rabner & Portner and James Ronayne (R. 1005, 1006, 1009, 1076).

e. The receivership was handled by attorneys Goldberg, Kohn and Wexler (R. 1175-6).

f. The handling of tax audits and relations with the Internal Revenue Bureau were handled by tax expert Ronayne (R. 1009, 1076).

g. The proceedings in Giglio's bankruptcy were handled by some attorney, but the evidence is that Lawn did not function as Giglio's attorney (R. 2279).

3. The Government attempts to escape the fact that the conspiracy alleged terminated when the tax was due, September, 1917.

This fact would preclude its allusions to later events to connect petitioner to the crimes charged. Petitioner's brief (pp. 67 *et seq.*) clearly shows that the government's argu-

ments are bottomed on scraps of evidence of Lawn's acts after the tax was due in September, 1947 and the conspiracy alleged in this case was dissolved, its ends achieved. There is no charge in the indictment that thwarting prosecution was part of the tax conspiracy to avoid tax payments. See, *Grunewald* v. *U. S.*, 353 U. S. 391 (1957).

To offset the effect of the Judge's charge in agreement with petitioner's contention that acts after the tax was due, September, 1947, could not establish a connection with the conspiracy charged and being tried, the Government says that the Judge made no such statement and it then quotes from the charge at R. 2717 but neglects to relate the actual charge on the point at R. 2716 and R. 2718, as follows:

> "Now I think that in order to find either defendant guilty under this account [sic] you must be convinced beyond a reasonable doubt that when the tax was due it could have been paid, if the assets had not been concealed." (R. 2716)
>
> "And, again, you must be convinced beyond a reasonable doubt that if they had not so concealed the assets of that corporation, that the tax could have been collected when it was due." (R. 2718)

1. The Judge charged that, in order to hold Lawn the Government had to prove that Lawn knew (1) the taxpayers owed taxes (2) the taxes were not paid, and (3) the taxpayers did not intend to pay the taxes (R. 2716, 2717-8). The Government has now virtually conceded that the prosecution failed to prove those essential elements of knowledge on the part of Lawn.

The Government now says simply that Lawn "knew the corporate income tax return for 1946 was being filed late, for he signed the request for an extension of time in which to file" (Br. No. 9, p. 66).

Obviously, this would not establish the requisite knowledge of the tax crime charged and even this statement by the Government is erroneous.

The paper referred to in the Government's brief is Exhibit 90 (not certified as part of the record herein) which according to the evidence, was filed on September 23, 1947 (R. 1146) after the corporate return for 1946 was concededly filed (Br. No. 9, p. 144). If then this paper was an application for extension of time to file returns, it must have related to some tax year, other than 1946, not involved in the indictment.

5. The Government has set forth in its brief a few wholly lawful and normal activities on the part of Lawn, and has attempted to weave a web of suspicion around those wholly lawful activities in an unsuccessful attempt to entangle Lawn. However, the Government has failed to establish even suspicion, and in any event the activities ascribed to Lawn have no connection with the crimes charged in the indictment.

For convenience we lump the activities ascribed to Lawn in their respective categories.

a. The bulk of the Government's brief is addressed to statements made about Lawn by someone else in Lawn's absence (Br. No. 9, pp. 63, 64, 71-2).

Suffice to say at this point that the Judge expressly charged that such "evidence" could not be used to connect Lawn with crime (R. 2695). See also our main brief (Pet. Br. 71-2).

b. The second largest part of the Government's so-called proof relates to what someone else said, allegedly in Lawn's presence, without any indication from Lawn whatsoever as to whether he agreed or disagreed with the statement (Br. No. 9, p. 64). As shown in our main brief, Lawn's mere presence without more does not make him a party to crime (Pet. Br. 63-4).

c. The Government further relies on the fact that Lawn drew salary and stock for his employee services and obtained the stock for $15,000 and that no withholding tax was deducted therefrom, and that Lawn International (a corpo-

tion) borrowed moneys from ABC (Br. No. 9, pp. 12, 65, 70-1).

Lawn's taxes are not involved in this indictment, and there is no proof or claim that Lawn did not pay his personal taxes on the salary and stock that he drew.

The fact that Lawn International may have borrowed or drawn moneys from ABC (Br. No. 9, pp. 70-1) is immaterial. Lawn International was not Lawn and there is no proof that it was. Early in the trial the prosecutor plainly disassociated Lawn International from this case (R. 276).

6. Another facet of the Government's claimed proof of Lawn's connection, concerns the purchase and sale of Giglio's house (Br. No. 9, pp. 66, 67, 80).

These were wholly innocent transactions, having no connection with the alleged crime (see Pet. Br., pp. 72-6) and the Government's brief does not show any connection therewith with crime.

The Government claims that, Lawn introduced a New Jersey lawyer to Giglio who could handle a New Jersey real estate transaction and suggested that Roth, a party to the transaction, should pay the $200 fee for the legal services "to make it look good" (sic) (Br. No. 9, p. 67). The proof shows that Tepper, the New Jersey real estate lawyer, was the only lawyer present at the closing (R. 1223), that Lawn did not act as an attorney (R. 1223) and that Roth lied when he originally testified that attorneys Fox and Goldhill had represented him at the closing (R. 1222). The statement "to make it look good" was made by Roth (R. 1222) before he realized he had so lied (R. 1223).

Accordingly, Tepper was entitled to be paid by someone and that someone turned out to be Roth.

The Government seeks by intermingling two entirely separate transactions (spaced nine months apart) to create an aura of fraud around a legitimate real estate transaction

(Br. 9, p. 70). The transaction in September 1947 was clearly no concealment, since Giglio's equity was at all times recorded in the proper legal office (Ex. 55, R. 595).

But, says the Government, since Roth, on the sale of the house in June 1948, predated a check which he obtained and gave the cash to Giglio for Giglio's equity, the original September 1947 transaction was somehow fraudulent.

Of course, Lawn was not present in June 1948 when Roth says he did these things, and there is no proof that Lawn had any knowledge thereof whatsoever (R. 1227-34). Roth did not testify that his June 1948 conduct had any relation to the September 1947 transaction; and the record seems plain that even Roth had no advance knowledge Giglio would want cash, or later knowledge of what he did with it, and that Roth simply dated the check incorrectly (R. 1229, 1231).

7. The Government places heavy reliance for a connection of Lawn to the tax evasions charged to the other defendants on what it claims was a fraudulent New Jersey receivership (Br. No. 9, pp. 65, 66, 67).

We have carefully analyzed the proof dealing with the receivership in our main brief and have shown that under no circumstances could the subsequent state court receivership have any connection with the crimes charged here (Pet. Br. pp. 68-9). We show here that the receivership was not even in fraud of creditors.

There is absolutely no proof that Lawn had anything whatsoever to do with nor was he the attorney in the New Jersey receivership. This was handled by Attorneys Goldberg, Kohn and Wexler (R. 1175-6).

The criticized plan was outlined in May or June 1948 (R. 1175) by Roth and was supposedly a plan of defense to the involuntary receivership proceedings filed by a *bona fide* creditor. Lawn did not dissent from Roth's plan of defense on Giglio's behalf (R. 1177).

Lawn owed nothing to the insolvent corporations, and, according to Roth, the debts in Roth's name were actually owed by Giglio (R. 1175-6). The assertion by the Government that "petitioners" owed debts (Br. No. 9, p. 70) is wholly without warrant (R. 1175-6). Thus, apparently, Giglio was the only one of the defendants who owed moneys to the insolvent corporations. Lawn derived no benefits from the receivership.

Giglio was the sole owner of Eatsum Food Products Company, a sole proprietorship, i.e., an individual doing business under an assumed name. Giglio was also the sole owner of Loraine Food Corporation (R. 1175, 1177).

Loraine was not in the receivership (R. 1180) and there is no charge in this indictment that the assets of Loraine were concealed.

ABC and ABW (American Brands Wholesale) owed moneys to Loraine and Eatsum—in short, they owed moneys to Giglio (R. 1177). Giglio owed moneys to ABC and ABW (R. 1177). The debts due to ABC and ABW were, according to the Roth "plan" to be offset against debts due from ABC and ABW to Loraine and Eatsum (R. 1177).

It is plain that Giglio and Eatsum were one and the same person, and hence it was perfectly valid to offset the debts to Eatsum against debts owing from Giglio; these debts were in law mutual and could be offset in insolvency proceedings.

With respect to the offset of Giglio's debts against debts owing to Loraine, the question is one of identity. Was Giglio in fact and in law the same as Loraine? The evidence indicates that he was (R. 1177). If this is so, then those debts were mutual and could be offset.

The fraud, according to the prosecutor, consisted of changing the words "account receivable" to "loan receivable" on the Loraine books (R. 2630). We fail to see any distinction

in such change of titles; they both evidence liabilities owing to the party named.

The prosecutor's characterization of the so-called plan of defense as a fraud was a matter plainly beyond the comprehension of an ordinary jury which naturally might rely on the opinion of the representative of the United States in such a matter.

The so-called perjury by prearrangement (Br. No. 9, pp. 22, 67) related to matter legally irrelevant to this tax case (R. 1532, 1534). The claim that the "false testimony" was by "prearrangement" was inserted unresponsively by Roth when he was trapped by his own perjury (R. 1532, 1534). Again, in relation to the receivership, the assertion by the Government that "falsified ledger sheets were submitted" in Lawn's presence at the May or June meeting when the defense to the receivership was "planned" (Br. No. 9, p. 70) is utterly without support in the record, and there was no discussion whatsoever at that meeting of falsifying any records (R. 1175-7).

The episodes of the receivership do not support the attempt to connect Lawn with the tax crimes asserted in this indictment.

8. The next category of so-called proof in the attempt to connect Lawn with non-payment of taxes is the evidence that Lawn attempted to head off prosecution after he was under information and indictment (Br. No. 9, pp. 68-9). This is completely answered in our main brief (Pet. Br., pp. 69-72).

9. The Government refers to other trivia or irrelevancy in an attempt to connect Lawn.

a. Thus Lawn was supposed to have asked Roth to prepare a false financial statement for issuance to Dun & Bradstreet (Br. No. 9, p. 64).[1] This is not the crime charged here and constitutes no link in the crimes charged.

b. The Government gratuitously says that "Lawn, *as legal adviser*, was 'instrumental' in organizing the various 'American' corporations early in 1946." (Br. No. 9, p. 65)

The Government fails utterly to document its gratuitous description of Lawn "as legal adviser" in this or any other connection.

The record references cited by the Government show that Lawn as head of research was instrumental in forming the corporations in anticipation that his research had neared fruition (R. 11245).

c. The Government says that when Lubben withdrew from Eatsum he did so over Lawn's protests. (Br. No. 9, p. 10). The cited references, however, are to protests by Giglio who wanted Lubben to stay in the partnership (R. 359-60).

d. The Government claims that Lawn once said he had terrific connections in the West and could "buy black market corn better and cheaper and faster." (Br. No. 9, p. 64). There is no statement in the record by Lawn that he could buy "black market corn" (R. 333, 1092). Even if Lawn had referred to black market corn, that is not the crime charged herein.

In sum, the Government has pointed to a few irrelevant activities on the part of Lawn having no substance towards establishing complicity in the tax crimes charged to the other defendants. The Government has not attempted to link these perfectly normal and lawful activities of Lawn to the crimes charged. The Government has apparently given up any attempt to show that there was evidence that Lawn had the requisite knowledge that 1) the taxpayers owed taxes, 2) that the taxes were not paid by the taxpayers, and 3) that the taxpayers did not intend to pay their taxes.

VI.

THE TRIAL BELOW MEETS NONE OF THE FEDERAL REQUIREMENTS FOR A FAIR TRIAL. THE JUDGMENT BELOW SHOULD BE REVERSED AND THE INDICTMENT DISMISSED.

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IN THE

Supreme Court of the United States

October Term, 1957.

No. 9

HOWARD LAWN,

Petitioner,

—vs.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR REHEARING

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Petition For Rehearing

Petitioner Lawn respectfully requests that the Court reconsider its judgment in *Lawn v. United States*, No. 9, O. T. 1957, January 13, 1958, for the following reasons:

1. The petitioner was denied relief on his claim that unconstitutionally secured evidence was illegally used against him on the basis of an implied waiver which, on re-examination, the Court must see could not have occurred.

The theory of the waiver asserted by the Court in its opinion was one which was not suggested, argued, or briefed by counsel on either side. Indeed, the waiver found by the Court to have existed contradicts the theory proffered to the Court by the Solicitor General.

2. The petitioner was denied relief on his claim of prejudice resulting from highly improper summation by the prosecutor, in part, on the basis of an error of fact which is demonstrable from the record.

I.

We respectfully suggest to the Court that it has created a precedent of broader implications than it might have appreciated. For the Court holds that where several possible interpretations might be made of a defendant's action, that interpretation of the facts will be assumed to be the proper one which may be read as a waiver of defendant's constitutional rights, despite the fact that such waiver is inconsistent with all of defendant's patient and exhaustive efforts both to avoid such waiver and to assert the rights which are afforded him by the Constitution.

A. The alternative constructions of Mr. Stryker's conduct.

In the context of the case, the following constructions of the action of Mr. Stryker, are reasonable alternatives:

1. It is reasonable to assume that Mr. Stryker did not appreciate the fact that tainted evidence was being used. This would not constitute a waiver of defendant's constitutional rights.

2. It is reasonable to assume that Mr. Stryker believed that the evidence originated from an innocent source, legally available to the prosecutor. This would not constitute a waiver of defendant's constitutional rights.

3. It is reasonable to assume that Mr. Stryker relied on the lulling assurances from the United States Attorney that no illegally obtained evidence would be used. This would not constitute a waiver of defendant's constitutional rights.

4. It is reasonable to assume that the proper interpretation is that of the Solicitor-General, that Mr. Stryker erroneously relied on the possibility that Judge Goddard had not ordered the documents in question returned to the defendant. This would not constitute a waiver of defendant's constitutional rights.

5. It is reasonable to assume that Mr. Stryker tried the case so as to serve the interests of all the clients whom he represented and not to advantage Lawn at the expense of Giglio and Livorsi. This required Mr. Stryker to hold fast to the bar against use of tainted evidence. This would not constitute a waiver of defendant's constitutional rights. We propose to amplify the force of this interpretation in our next point.

6. It is reasonable to assume — we are told by the Court — that Mr. Stryker, having spent years asserting the unconstitutional invasions of his client's interests, gave up Lawn's constitutional rights in order to secure an opportunity to drive home to the jury a point (which the evidence could not prove and which counsel was precluded from making because of the conflicting interests of his clients). We propose to examine the force of the Court's interpretation in our next point. Assuming its validity, however, it is but one of the several possible alternatives and the only one of all of them on which the Court can base a theory of waiver.

B. Mr. Stryker did not intend to choose and serve one of two conflicting interests.

The Court has imputed to Mr. Stryker the purpose to prove that the check was an innocent loan and not an incriminating legal fee. To serve this purpose, Mr. Stryker is found to have consciously and intentionally lifted the absolute bar which Lawn held against the use of tainted evidence.

The necessary corollary of this Court's construction of Mr. Stryker's purpose is that he chose and intended to serve

one of two conflicting interests which he was representing, viz., to further the interest of Lawn at the expense of Giglio and Livorsi.

It was to the interest of Giglio and Livorsi to establish that the $15,000 was a legal fee and therefore a deductible expense on the part of Tavern. This $15,000 would then diminish the income of Tavern which was chargeable to Giglio and Livorsi, and this would tend to prove absence of tax deficiency on the part of Giglio and Livorsi.

To the contrary, if the $15,000 was a loan, then it was not deductible by Tavern.

The Court's construction thus necessarily imputes to Mr. Stryker a conscious purpose to jettison Giglio and Livorsi to protect Lawn. This premise is inadmissible here and effectively negates the imputed waiver. See *Glasser* v. *U. S.*, 315 U. S. 60, 75-6 (1942); *Jenkins* v. *U. S.*, 249 F. 2d 105 (9 C. Cir. 1957).

On the Court's construction, Mr. Stryker was faced with a fundamental dilemma how to proceed because the Court imputes to him an awareness of the tainted character of the proof; the dilemma was the conflicting interests of his clients. "In short, he [Stryker] had no meaningful choice." *Green* v. *United States*, 355 U. S. , 2 L. ed. 2d 199, 206 (1957).

An intention to preserve the bar against tainted evidence involved no dilemma for Mr. Stryker and such an intention is the only one which served and is consistent with the interests of all the clients of Mr. Stryker. He made this intent clear when he said:

> "I want to * * * make sure that I don't overlook any constitutional rights that are involved." (R. 1355).

C. The Court's theory that Mr. Stryker was using an opportunity fails on analysis.

The assumption that Mr. Stryker was seizing his only opportunity to prove that this was an innocent loan and not an incriminating legal fee fails on analysis. The introduction of the check might make it necessary for Lawn to give an

explanation of its purpose. The exclusion of the check called for no explanation. The check served only a Government purpose and nothing about it could help Lawn's defense in this case. The purpose of the check could not be constructed from the face of the paper since this gave no clue to the purpose of the payment. The questions which Mr. Stryker addressed to the witness Roth preliminary to the receipt of the check in evidence gave no indication nor did any answer thereto indicate that a loan and not a legal fee was represented by the check. It is impossible to point to any language in this preliminary examination which indicates conscious purpose to stamp the check as a loan and not a fee, or vice versa. To prove this point we set out every question and answer and a re-examination thereof will show that none contains any language suggesting the purpose for the payment.

"*Preliminary Questions by Mr. Stryker:*

Q. In whose handwriting are the entries on Government's Exhibit 61-B for identification? I think you said it is the stub book. A. To the best of my recollection, those are Mr. Cerone.

Q. How do you spell Cerone? A. Cerone.

Q. He was one of your employees, Mr. Roth? A. No, he was a bookkeeper employed by Tavern Fruit Juice.

Q. Would the same be true with regard to the check, the face of the check, payee of the check? A. The payee of the check and the amount?

Q. The handwriting is what I am asking about. A. The handwriting, that looks like William Giglio's handwriting.

Q. The maker of the check and the $15,000? A. Yes, the signature.

Q. They look like his handwriting, do they? A. Yes, sir.

Q. And this 61-B for identification, you have told me that that looked like the printing or the writing of Mr. Cerone, did you not? A. Yes, sir.

Q. And under that check stub or in that No. 640, which corresponds with the check itself, there is a parenthetical statement "Bill G"? A. Yes, sir.

Q. Indicating it is for Mr. Giglio's account? A. Yes, sir.

Mr. Stryker: No objection.
Mr. Wessel: I have just one question.

By Mr. Wessel:

Q. Mr. Roth, would you identify Mr. Cerone a little more fully, please? A. You mean by physical description?
Q. What is his full name? A. I think it was Anthony.

(Government's Exhibits 61-A and 61-B for identification received in evidence.)" (R. 1022-23).

Significantly, during the especially long general cross-examination of the witness Roth, Mr. Stryker did not even advert to the subject of loan versus fee. If he had any intent on the trial to drive home to the jury the purpose for the check, the time to do so was during the wide open cross-examination of Roth who admittedly mislabeled the purpose of the payment in the first place. The preliminary examination which was limited in scope was no place for Mr. Stryker to prove this point and his conceded experience precludes imputing to him an inopportune procedure.

D. Awareness of the taint cannot be spelled from the preliminary examination or other conduct of Mr. Stryker.

The questions which Mr. Stryker addressed to the witness Roth preliminary to the admission of the papers in evidence give no indication of the state of his awareness of the source of the evidence.

On the other hand, the record makes plain that at no time during the trial did Mr. Stryker have any notion whatsoever that Exhibits 61A-B were the outlawed documents whose use had been proscribed. The trial Judge virtually offered Mr. Stryker the hearing that he had been recurrently demanding if Mr. Stryker would only point to some use on the trial of tainted evidence.

> "The Court: * * * is there anything in this trial before this jury that has been improperly obtained? * * *.
>
> "Mr. Stryker: The point was really that we were not able to find out whether those things were improperly obtained or not." (R. 2077; also, R. 1957-9).

If it is true that Mr. Stryker realized the taint of Exhibits 61A-B and of the oral testimony of the witness Roth which was derived from and preceded the introduction of the exhibits, Mr. Stryker had a hearing within his grasp and the inference is inescapable that he would have pointed out this tainted proof to the Judge.

The Solicitor General underscores Mr. Stryker's unawareness of the tainted proof thus:

> "One can surmise that the reason no memorandum [of use of tainted evidence] was submitted was that defense counsel was unable to find in the record any item of evidence which 'could have been developed'". (Br. No. 10 p. 32 fn. 14)

We respectfully point out that on the score of Mr. Stryker's awareness, this Court's opinion is internally inconsistent. In the closing paragraph of Section I of the opinion, at page 10, the Court states:

> "We deal here only with the question whether petitioners, in the circumstances of this case, were entitled to a preliminary hearing to enable them to satisfy their *unsupported suspicions* whether the 1953 grand jury that returned the indictment made any direct or derivative use of the materials which they produced before the 1952 grand jury. We hold they were not." (Emphasis supplied.)

Is it not true that if, as the Court later states, Mr. Stryker is to be charged with knowledge that evidence illegally secured before the 1952 grand jury was used on the trial, his "suspicions" during the trial that this tainted evidence was used before the 1953 grand jury would not be "unsupported" if during the trial he was aware of the use of the same tainted evidence?

Can the Court at one and the same time say that during the trial Mr. Stryker knew of the unconstitutional use of the illegally obtained evidence for the purpose of "waiving" his client's constitutional rights but that he did not know of it during the trial for the purpose of supporting his "suspicions" about the use of that evidence before the 1953 grand jury?

We respectfully submit that it is not due process, when a man's liberty is at stake, to utilize mutually contradictory assumptions of fact in the decisional process and to conclude that there is an absence of reversible error.

E. The Government never argued the theory of waiver which the Court adopted.

This Court's basis for imputing to Mr. Stryker an intent to lift the bar of Lawn's constantly reiterated constitutional objection to the use of tainted documents was not suggested, argued or briefed by either counsel; indeed something entirely different was claimed by the Solicitor General.

The Solicitor General's premise was utterly at odds with ascribing to Mr. Stryker a purpose to make a jury argument by conscious use of outlawed evidence. The Solicitor General argued:

> "Accordingly, the only credible explanation of Lawn's consent to the admission in evidence of Exhibits 61 A and 61 B is that he agreed with the Government that these exhibits were not covered by the return order" (Govt. Br. No. 9, p. 17).

This Court implicitly has found that the exhibits were covered by Judge Goddard's return order and there is no legal substance to this hypothesis of the Solicitor General. Significantly however, the explanation of the Solicitor General accepts and proceeds on the notion that Mr. Stryker was unaware of the tainted character of the proof.

If the Government had argued the theory of waiver which the Court adopted, the petitioner would have pointed out to the Court that Lawn's constitutional rights were already

violated by the use on the trial of the check and the stub before the papers were ever offered in evidence, and surely no waiver of such use is imputable to Mr. Stryker.

Illegal use of the outlawed evidence was made by the Government on the direct examination of its witness, Roth (R. 1021). The prosecutor placed the tainted check and stub in Roth's hands, *before they were offered in evidence at all*, and presumably before they were exhibited to Mr. Stryker, and elicited through the witness every material detail of the check and stub, connected the same with the testimony on "Mr. Lawn's legal fee," and only then, offered the documents in evidence as Exhibits 61A-B, and presumably then showed them to his adversary.[1]

At this point in the trial, the Government had fully used evidence which had been outlawed by Judge Goddard who had directed the return of and outlawed this evidence. The Government legally had no excuse to make use of the tainted papers and the conviction stands on a tainted record.

As matter of law, Mr. Stryker, by the pretrial motions, is deemed to have objected to this constitutional invasion and Lawn's constitutional objection was secure for all purposes

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[1] "By Mr. Wessel:

"Q. Mr. Roth, I show you Exhibits 61-A and B for identification and ask you if you can tell me what those two are? A. 61-A is a check drawn on the account of Tavern Fruit Juice Company by William Gigho and signed by Frank Livorsi, to Howard Lawn, endorsed by Howard M. Lawn. 61-B is the stub of a checkbook—there are three names on it. The bottom one is Howard Lawn, $15,000, and in parenthesis 'Bill G.'

"Q. Sir, do you recognize the stub, which is 61-B, and the check, which is 61-A, is the $15,000 to which you referred a few minutes ago in connection with Mr. Lawn's legal fee? A. Yes, sir.

"Q. With regard to the check stub for check No. 640, the $15,000 check, can you tell me at what time the various entries on that check stub were made? A. The date the check was issued.

"Q. Is that true with regard to the parenthetical notation, 'Bill G.'? A. I do not know.

"Mr. Wessel: I offer in evidence Exhibits 61-A and B.

"Mr. Stryker: Just a question of two." (R. 1021)

After this evidence there followed the "Preliminary Questions by Mr. Stryker:" (R. 1022)

thereafter without requirement of any further articulation thereof. *Cogen* v. *United States*, 278 U. S. 221 (1929).

The waiver imputed by the Court relates to the second of the two uses of the tainted proof, i.e., the admission into evidence of Exhibits 61A-B. As matter of law there could be no waiver since the Government's oral use established the irremediable error. Mr. Stryker was entitled to try the remainder of the case without again renewing Lawn's objection which Judge Goddard had preserved. *Waldron* v. *United States*, 219 F. 2d 37, 41 (D. C. Cir. 1955); *United States* v. *Wheeler*, 149 F. Supp. 445, 447 (W. D. Pa. 1957).

The Court's opinion points to Judge Palmieri's admonition that Lawn could object on the trial if he had reason to believe that the Government was using tainted proof. The Court also refers to the legal rule where a pretrial motion to suppress is overruled and states that it is unnecessary again to object on the trial, subject to exceptions (none of which ever favor the Government). However, there are no exceptions to the legal rule where as here the motion to outlaw and return has been granted and not merely deferred to the trial.

The Court's construction completely overlooks that Judge Goddard's ruling outlawing Exhibits 61A-B became a controlling rule in the case just as did a ruling made during the trial, and necessarily determined the conduct of the trial. *Cogen* v. *U. S.*, 278 U. S. 221, 223 (1929).

After Judge Goddard's ruling it was unnecessary for Lawn to reiterate his position once considered and decided. Lawn was not required again to articulate his constitutional objection to preserve this bar against the evidence. *Greco* v. *Reading Co.*, 183 F. 2d 716 (3 Cir. 1950); *Morgan* v. *Pennsylvania R. Co.*, 166 F. 2d 543 (3 Cir. 1948). Mr. Stryker could only lift the bar to Exhibits 61A-B by unequivocally consenting to the nullification of Judge Goddard's order. A vested bar is not lifted by equivocal conduct. "The force and vitality of judicial decrees derive from more robust sanctions." *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187, 191 (1949).

F. The imputed waiver is contradicted by all of Mr. Stryker's efforts to preserve the defendant's constitutional rights throughout the trial.

That Mr. Stryker had no intent to surrender any of Lawn's constitutional rights appears plainly and frequently throughout the record. We offer the following examples: He said: "I want to * * * make sure that I don't overlook any constitutional rights that are involved" (R. 1355).

And again the record discloses:

> "The Court: * * * is there anything in this trial before this jury that has been improperly obtained? * * *.
>
> Mr. Stryker: The point was really that we were not able to find out whether those things were improperly obtained or not." (R. 2077)

In sum, the purpose imputed to Mr. Stryker does not stand analysis of its implications, and it is contradicted by the record.

Further, the use of the tainted evidence was irremediable error. The tainted evidence had been used even before the use thereof as an exhibit in evidence. Lawn was protected against all use by Judge Goddard's order sustaining his objection to this evidence, not overruling or deferring it to the trial.

Further, Mr. Stryker made no use either of the oral proof or of the documents so adduced by the Government—no use in any way. He did not cross-examine Roth on the substance or purpose of the payment either on preliminary or general cross-examination and he made no mention of the oral testimony or the check or its purposes on summation.

Mr. Stryker is not reasonably chargeable with having lifted the constitutional and judicial bars to the use on the trial of the tainted evidence.

II.

This Court has ruled that the prosecutor in summation did not go outside the record to bolster his case against the defendants, relying on the thesis that the prosecutor's statement that "We vouch for them (Roth and Lubben) because we think they are telling the truth" was in "reply" to Mr. Stryker's summation. In fact, Mr. Stryker's "summation" did not contain the remarks attributed to him by the Court in footnote 15 of its opinion. The material referred to was remarks of Mr. Stryker in his "opening" to the jury (R. 2901-5)—remarks which had been made some seven weeks prior to the prosecutor's summation—hardly likely to have incited the misconduct of the prosecutor which the Court has condoned. The brief of the Solicitor General led the Court into this error. (Br. No. 9, pp. 53-4).

On this matter we wish on this application only to make a single suggestion, that prior to the decision herein experienced and impartial trial lawyers had little or no reason to believe from any previously decided cases, or from any bar committee's analysis of the ethical question involved, or from any authoritative text writer, that a prosecuting official was privileged, whether on testimony of witnesses given before the jury or even on being goaded by an adversary, to "vouch" for his own witnesses "because we believe they are telling the truth."

The innovation introduced into the federal law by the decision herein merits further examination of its implication and desirability as a standard of Government conduct especially since on standards of state courts no such conduct of a prosecutor is tolerated. See state court cases, petitioner's main brief, N. 9, ftn. 21.

WHEREFORE, petitioner prays for a rehearing of this Court's decision of January 13, 1958.

Respectfully submitted,

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Milton Pollack, counsel for petitioner, hereby certifies that the above application is made in good faith and not for the purpose of delay.

Dated: New York, N. Y., February 5, 1958.

MILTON POLLACK